

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,013

503

W. H. HANSEN,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

APPEAL FROM MEMORANDUM OPINION AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 3 1968

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

W. H. HANSEN,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

Case No. 22,013

STIPULATION OF PARTIES WITH REGARD TO THE RECORD

In accordance with Rule 17(b) of the Federal Rules of Appellate Procedure, all the parties in the above case stipulate that neither the record nor a certified list will be filed with the Court. In addition, the parties will file the appendix as provided in Rule 30(a) and (b). Thus, citations to pertinent parts of the record will be to the appendix which will be filed with appellant's brief.

Respectfully submitted,

/s/John H. Conlin
John H. Conlin,
Associate General Counsel.

Federal Communications Commission
Washington, D. C. 20554

/s/Seymour M. Chase
Seymour M. Chase,
Counsel for W. H. Hansen.

Brawner Building
Washington, D. C. 20006

July 8, 1968

* * * * *

STIPULATION

The parties to the above-captioned case hereby stipulate that the issues presented are:

1. Did the Commission err in dismissing appellant's assignment application without a hearing?
2. Did the Commission correctly invoke and apply its rule against the retention by an assignor of any reversionary interest in an assigned license?

The parties further stipulate that they have agreed to the contents of the appendix, and that citations to the record in their respective briefs will be to the appendix.

* * *

July 16, 1968

* * * * *

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their prehearing stipulation pursuant to Rule 33 of the Federal Rules of Appellate Procedure and Rule 19 of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this Court, and that the stipulation and this order shall be printed in the appendix herein.

[Filed July 22, 1968]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re Application of)
RADIO KDAN, INC.)
Assignor)

and)

PHIL JACKSON)
Assignee)

For Assignment of License for)
KDAN, Eureka, California)

File No. BAL-6046

PETITION TO DENY

W. H. Hansen, by his attorney, now petitions for the denial of the above-entitled application.

In support whereof, it is shown that:

Petitioner's Standing

1. The subject application is for the Commission's consent to a voluntary assignment of the license for standard broadcast station KDAN, Eureka, California from the current licensee, Radio KDAN, Inc., to one Phil Jackson.

2. As is shown by the affidavit of the petitioner submitted herewith as Attachment A, and the documents referred to therein, the petitioner now has full and exclusive title to, and full and exclusive possession of, all the real and personal property which was utilized by Radio KDAN, Inc. in and for the operation of Station KDAN. Moreover, the petitioner now has pending before the Commission an application for its consent to an involuntary assignment of the license for Station KDAN to himself. The application was filed on

May 17, 1967, and an amendment thereof was filed on June 12, 1967.

Substantive Matters

3. The subject application must be denied for the reason that the proposal is for an assignment, for a consideration, of the bare license for Station KDAN, and such an assignment is contrary to law.

4. Contained in the subject application as Exhibit 3 is the purchase agreement between the licensee and the proposed assignee. In this agreement, under the subheading "Properties to be Conveyed", only the following provisions appear:

"2. Seller agrees to sell and/or assign and Buyer agrees to purchase and/or accept the assignment of the following, free from all liabilities, and encumbrances:

"(a) The license from the Federal Communications Commission for the operation of Station KDAN; and all other licenses, permits or other instruments of authorization, including applications therefor, relating to the Station."

Thus, the agreement provides for the sale of nothing but the license for the station. At Paragraph 4, the agreement goes on to provide that the consideration to be paid for the aforesaid "properties to be conveyed" is \$24,500, with \$500 having been paid on execution of the agreement and the balance to be paid at the closing.

5. Section 301 of the Communications Act of 1934, as amended, provides, with reference to licenses for stations, that:

"...no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."

This statutory provision has uniformly been interpreted to mean that nothing in the nature of a property right is vested in the licensee by virtue of the granting of the license.

Federal Communications Commission v. Sanders Brothers Radio Station, 309 U. S. 470, 9 RR 2008, 2011 (1940), Trinity Methodist Church, South v. Federal Radio Commission, 62 F. 2d 850, 853 (1932), American Bond & Mortgage Co. v. United States, 52 F. 2d 319, 320 (1931), KSTP, Inc., 22 RR 35, 38-39 (1961).

6. Given that Radio KDAN, Inc. owns no interest in the license for KDAN which amounts to a vested property right, it is not entitled to receive a consideration for an assignment of the license, and it must not be permitted to do so.

Accordingly, in view of the foregoing, the Commission is petitioned to designate the subject application for hearing on appropriate issues, and thereafter to deny it.

* * *

June 23, 1967

* * *

Attachment A

AFFIDAVIT

W. H. Hansen, being duly sworn, deposes and says that:

All the land, buildings, equipment, furniture, furnishings, and other tangible assets which have been used in the operation of station KDAN, and remain on the premises of the station, are now owned by me, and are solely in my possession and under my control.

On May 17, 1967, I filed with the Federal Communications Commission an application for its consent to an involuntary

assignment of the license for KDAN from the present licensee to myself, and on June 12, 1967, I filed an amendment of the application. Copies of the papers establishing my ownership of the real and personal property of the station are included in the application and the amendment.

Neither James F. Hadlock nor Phil Jackson has any ownership interest in, or any possession or control of, any of the real property of the station, or any of the personal property now on the premises of the station.

* * * * *

OPPOSITION OF RADIO KDAN, INC. TO
"PETITION TO DENY"

Petitioner's Standing

1. Petitioner W. H. Hansen claims standing because he allegedly holds full title to and possession of personal and real property formerly used in the licensed operation of Station KDAN. He has filed an application for involuntary assignment of KDAN to him, which application is of course mutually exclusive with the instant application for Commission consent to voluntary assignment of the license to Phil Jackson.

2. The fact that Hansen has obtained some or all of the property formerly used in operating KDAN gives him no standing whatsoever to protest the instant application. Hansen does not even cite any authority to support his claim of standing, and none is to be found.

3. As for Hansen's mutually exclusive application for involuntary assignment, it is clear that the application must

be dismissed by the Commission as improperly filed. The Commission has failed to accept that application for filing since it was tendered on May 17, presumably due to the obvious impropriety of the application. It is only reasonable to expect that this impasse will be resolved by dismissal of the Hansen application.

4. Hansen's application for involuntary assignment of license is obviously incomplete. It consists of the assignee's portion only of Form 314 (beginning with Page 4 of Section I). Nowhere in the application or the amendment does the applicant recite any legal basis for supposing that the presently outstanding license can be taken away from the present licensee (Radio KDAN, Inc.) and handed over to Hansen without any due process whatsoever. The fact that a licensed station is silent due to financial difficulties does not operate to forfeit its license automatically, as the learned counsel representing Mr. Hansen is well aware. Yet he assumes without citing any authority that whoever may acquire, by foreclosure or otherwise, property formerly used by the licensee thereby acquires a right to the station license. The stake which the present licensee may have in the license, by virtue of operation thereunder, is supposed to be ignored.

5. It is clear that Hansen's tendered defective application will have to be dismissed, and that his ownership of certain property formerly used by KDAN in broadcasting confers on him no standing to protest the voluntary application for assignment to Phil Jackson.

Substantive Matters

6. The circumstances of this case are such that the Commission in the exercise of its discretion should approve the assignment application involving the payment to assignor of \$24,500. As shown by the attached affidavit of James F. Hadlock, he has invested approximately \$192,800 to date in KDAN, and has drawn no return whatsoever in profits or salary. Radio KDAN bought Station KDAN from the protestant, W. H. Hansen, under contract for an agreed price of \$225,000 plus interest. To date Hansen has received \$206,800 in principal and interest. However, the licensee in 1966 was forced to suspend broadcasting because of financial reverses when it was no longer feasible to pour additional funds into the station to meet operating losses. KDAN was purchased from Hadlock in 1959 and, as noted in the attached affidavit, the area in 1960 was officially designated a distress area because of high winds, tidal waves and serious floods. These unfavorable weather conditions were detrimental to the economy of the area, and as a result, KDAN operated at a loss since 1960. It is only fair to recognize that Mr. Hadlock struggled from 1960 to 1966 to restore KDAN to profitable operation before finally being compelled by circumstances to cease broadcasting. The Commission should note that the consideration to be received by Mr. Hadlock under the agreement herein is only \$24,500, which will not enable him to make any profit whatsoever on his operation of KDAN; in fact, he will still be sustaining a very substantial loss even after consummation of the agreement herein. In other words, a licensee who operated the station for seven frustrating years seeks by the instant

agreement to recoup a small fraction of the total losses sustained and to turn the license over to an experienced broadcast operator who has the capital, the background and the time available to devote personally to KDAN to restore it to useful operation.

In view of the foregoing, the Commission should grant the assignment application to Phil Jackson and deny W. H. Hansen's "Petition to Deny".

[Filed July 5, 1967]

* * *

* * *

TO WHOM IT MAY CONCERN:

The following represents a general breakdown of actual monies paid to William H. Hansen on the KDAN Contract, beginning June 15, 1959:

Total Purchase Price KDAN: \$225,000.

The following amounts were paid on the dates indicated below:

June 16, 1959	\$ 60,000.	(prin)
July 15, 1959-December 15, 1959	3,200.	(int. only)
January 15, 1960	5,000.	(prin)
February 15, 1960-March 15, 1961	35,000.	(prin & int)
May 15, 1961-October 15, 1961	6,000.	(prin & int)
December 19, 1961	25,000.	(prin & int)
January 25, 1962	33,000.	(prin & int)
April 25, 1962	34,200.	(prin & int)
February 1, 1960	5,400.	(land payment)
To date a total of:	\$206,800.	(principal & interest paid)

Payments are broken down as follows:

not less than:	\$186,586.23
not less than:	14,800.00

Early in 1960 the Eureka-Arcata area covered by Radio Station KDAN was designated a distress area by the Federal Government due to serious floods, tidal waves and high winds. The economy was seriously effected and as a direct result KDAN has operated at a loss since that date.

James F. Hadlock, President of Radio KDAN, Inc. has been personally responsible for arranging all the above listed payments to Mr. Hansen - approximately \$46,000. direct from KDAN and \$140,300. from Hadlock. In addition, Hadlock has contributed more than \$32,000. to make up operational losses. Hadlock's total cash investment to date in KDAN is approximately \$192,800., with no return. Hadlock has personally drawn no monies, whatsoever, either in salary or profits from KDAN.

Radio KDAN, Inc. owes Mr. Hansen only \$38,413.77 (plus interest) of the original \$225,000. Contract.

I hereby warrant that the above figures and information are correct to the best of my knowledge.

Dated this 28 day of June, 1967.

/s/ James F. Hadlock
James F. Hadlock, President
Radio KDAN, Inc.

* * * * *

REPLY

W. H. Hansen, by his attorney, now replies to the pleading filed by Radio KDAN, Inc. on July 5, 1967 as an opposition to the "Petition to Deny" filed by Hansen on June 23, 1967.

Petitioner's Standing

1. If the subject application were to be granted, the assignee would receive from the Commission a license which would specify a transmitter site and transmitting equipment which the petitioner owns, and control of which the assignee has not sought or obtained. This alone gives the petitioner sufficient interest in the event to afford it standing to resist the application. Moreover, the petitioner is himself seeking the same license, and is thus obviously a person whose interests would be adversely affected if the subject application were granted.

2. Radio KDAN, Inc. argues that the petitioner's pending application for the Commission's consent to an involuntary assignment of the license must be dismissed, and does not therefore provide the petitioner a basis for standing herein. Petitioner does not agree, but it is now taking steps which will dispose of this argument. The petitioner owns the land, building, and equipment of KDAN by virtue of the exercise of his right, as mortgagee, to foreclose on the purchase money mortgage which was given to him by Radio KDAN, Inc. in 1959. In view of the position taken by Radio KDAN, Inc. in its opposition pleading, petitioner is now exercising another right granted by the mortgage. The mortgage instrument contains a provision authorizing this petitioner to act as attorney in fact for Radio KDAN, Inc. for the purpose of applying to the Commission for consent to an assignment of the license to the petitioner in the event of default and foreclosure. Acting under that provision, the petitioner has prepared, and will promptly execute and file

with the Commission, an assignor's portion for the pending involuntary assignment application.

3. In addition, the petitioner is now undertaking to obtain, from the court having jurisdiction of the matter, an order restraining Radio KDAN, Inc. from assigning, or seeking authority to assign, the license for the station. A copy of the order will be filed with the Commission immediately after it is obtained.

Substantive Matters

4. The petitioner is charged with asserting, without any legal basis,

"...that the presently outstanding license can be taken away from the present licensee...and handed over to Hansen without any due process whatsoever." Opposition, P. 2.

It must be apparent that the petitioner has made no such assertion. Its pleading is a request that the subject application be designated for hearing - thus affording the licensee all the due process to which it is entitled - and the pleading rests on a showing that a hearing is required because there are substantial issues to be resolved before the application can be granted.

5. The petitioner has shown that the proposal before the Commission is for an assignment of a bare license for a consideration, and that there is a substantial question whether such an assignment is lawful. A hearing is clearly required to permit a resolution of the question.

6. The petitioner has shown that the licensee does not own, or have any right to use, the transmitter site and the transmitting equipment of the station. It follows that the

proposed assignee would not acquire any ownership of, or any right to use, either the site or the equipment. A hearing is clearly required to enable the Commission to determine whether an assignment of license may be approved in such circumstances.

7. Finally, should the petitioner file an assignor's portion for the pending involuntary assignment application, properly executed by the petitioner as attorney in fact for the licensee, and should the petitioner also secure and file a court order restraining the assignment proposed by the licensee, a hearing will be required to determine what the rights of the parties are and what action by the Commission will best serve the public interest.

* * *

July 17, 1967

* * *

* * *

MEMORANDUM OPINION AND ORDER

Adopted February 21, 1968

Released February 29, 1968

By the Commission: Commissioner Lee absent; Commissioner Cox concurring in the result.

The Commission has before it: (1) the above-captioned assignment application filed with the Commission on April 19, 1967, (2) a Petition to Deny filed on June 23, 1967 directed against the assignment by W. H. Hansen, the former owner of KDAN; an Opposition to the Petition to Deny filed by Station KDAN, Inc. on July 5, 1967 and a reply to the Opposition filed

by Hansen on July 17, 1967.^{1/}

1. Station KDAN, Eureka, California, originally owned and operated by W. H. Hansen of Medford, Oregon, was sold to Radio KDAN, Inc. in 1959 for the sum of \$225,000, a transfer that was formally approved by the Commission on June 15, 1959. A down payment of \$60,000 was made to Hansen at the closing and the remaining \$165,000 was secured by a mortgage and note in Hansen's favor. A default in mortgage payments occurred in 1961. Foreclosure proceedings were thereupon commenced by Hansen. On January 18, 1963, Radio KDAN, Inc. instituted voluntary bankruptcy proceedings but before a discharge could be obtained, Hansen foreclosed on the original mortgage on which approximately \$50,000 was still owing. At the foreclosure sale, in February 1966, Hansen, the sole bidder, purchased for \$85,000 the real and personal property of Station KDAN and subsequently filed suits for possession of this property. (The

^{1/} On May 17, 1967, Hansen tendered for filing with the Commission an assignment application. The section normally executed by an assignor was missing and the document was never formally accepted for filing. By an "amendment" dated July 20, 1967, Hansen attempted to correct this flaw by filing the assignor's part of the application, executed by himself. He claimed he was empowered to execute that document because of a provision in a 1959 mortgage contract with the present licensee which, purporting to be a mortgage on the station license itself, gives the mortgagee (Hansen), in the event of default, the right to execute an assignment application as the mortgagor's "attorney in fact". In our view, such a clause is void ab initio since it attempts to retain for Hansen a reversionary interest in the KDAN license, and as such is expressly forbidden by Section 73.139 of our rules. The extraordinary notion that a station license issued by this Commission is a mortgageable chattel in the ordinary commercial sense is untenable. Furthermore, the alleged mortgage agreement of 1959 was brought to the Commission's attention for the first time in July 1967, and had never been previously filed with the Commission, as required by our rules. We need not treat of this matter at length, however, because our action today in declaring forfeit the KDAN license, renders it moot.

\$85,000 sum represented principal owing plus interest and attorney fees.) On July 10, 1966 Station KDAN went silent and Hansen, as a judgment creditor, thereupon obtained a writ of possession, and accompanied by the U. S. Marshal, took possession of the premises on July 25, 1966.

2. On April 19, 1967, Radio KDAN filed an application for the assignment of license (BAL-6046) to one Phil Jackson who proposed to build a new station which would be operable in six months. The "Purchase Agreement" dated April 11, 1967 which accompanied the assignment application listed the KDAN station license as the sole subject matter of the conveyance. No other property was listed; indeed Station KDAN, Inc. had no other assets to convey, all the corporation's real and personal property having been sold at the foreclosure sale.^{2/} The pending assignment thus contemplates little more than the sale of the naked license.^{3/} Commission policy bars such a sale: On October 10, 1967 in the case of Station KHIP, Albuquerque, New Mexico (11 RR 2nd 417), the Commission denied a petition for reconsideration and affirmed the staff's dismissal of an assignment application where the licensee had "little to transfer" beyond the license itself. "The Commission", the Order concluded, "will not permit a price to be placed on the transfer of a bare license." On December 13, 1967, the Commission in the Bonanza Broadcasting Corporation case (11 RR 2nd 1072) declared forfeit the license of Station KDEY, Boulder, Colorado, and dismissed a pending

^{2/} An addendum filed January 3, 1968 recited the acquisition of some new equipment by Radio KDAN, Inc., but the station still has no antenna and no broadcasting site available to it.

^{3/} The April 1967 Purchase Agreement recited a consideration of \$24,500.

assignment application for substantially the same reasons. For these reasons, the Commission will here, on its own motion, dismiss the pending assignment application. This action renders moot the Hansen Petition to Deny, which will accordingly be dismissed.^{4/}

3. As noted above, Station KDAN went silent on July 10, 1966 and the licensee subsequently requested and received authority to remain silent pending "completion of repairs", the target date being October 1, 1966. On September 19, 1966, the licensee's president stated that broadcasting would be resumed by October 15, 1966. But, on October 28, 1966, the licensee advised the Commission "We are now ready to resume operations within the next few days." On March 1, 1967, Hadlock, President of Radio KDAN, Inc., advised the Commission that the station expected to resume broadcasting on May 1, 1967. In point of fact, KDAN never resumed broadcasting after July 1966, and this prolonged silence has been without Commission authorization.

4. Since the licensee has informed the Commission that he is unable to resume broadcasting, since there is in fact no site and no antenna available with which the licensee could broadcast, and since for many months the station's silence has been without the Commission's authorization, it is our view that the KDAN license must now be declared forfeit, thus making the frequency available for use by others in Eureka or some other appropriate community.

^{4/} The Hansen Petition argued inter alia that the Hadlock-Jackson assignment should be denied since it contemplated nothing but the assignment of the naked license, and, as such, violated Commission policy.

5. In view of the foregoing, IT IS ORDERED, That the above-captioned application for assignment is DISMISSED; the Hansen Petition to Deny is DISMISSED as moot; the KDAN license is hereby declared forfeit.

FEDERAL COMMUNICATIONS COMMISSION

*	*	*	*	*	*
*	*	*	*	*	*

PETITION FOR RECONSIDERATION

W. H. Hansen, by his attorney, and pursuant to Section 1.106 of the Commission's Rules, now petitions the Commission to reconsider, in part, the actions reflected in its Memorandum Opinion and Order released February 29, 1968 in the above-captioned matter (FCC 68-208).

In support whereof, it is shown that:

1. On June 10, 1959, the Commission granted its consent to an assignment of the license for standard broadcast station KDAN, Eureka, California, from W. H. Hansen to Radio KDAN, Inc. As partial consideration for the assignment, Radio KDAN, Inc. was to give Hansen a mortgage on the real and personal property of the station, with provisions that, in the event of default, those assets could be sold at public auction, in accordance with the requirements of California law, and Hansen would be entitled to bid and to purchase.

2. On June 15, 1959, the parties met to consummate the assignment, and a notice of the consummation was subsequently filed with the Commission. In the course of the closing, the parties, by agreement, added a rider to the mortgage to provide

as follows:

"The mortgage of the FCC license of Radio Station KDAN is made pursuant to a plan of installment payments represented by the note which this mortgage secures, which said plan has been approved by order of the FCC. Mortgagor irrevocably appoints Mortgagee as Mortgagor's attorney in fact for the purpose of applying to the FCC for transfer of said license to Mortgagee in the event of default by Mortgagor under this mortgage or the note which the same secures and the exercise of any of Mortgagee's rights hereunder by Mortgagee upon such default."

3. On May 17, 1967, petitioner filed with the Commission an application for its consent to a reassignment of the license to him. By the application, petitioner showed that pursuant to appropriate court orders, the licensee had been found in default, the tangible assets of the station had been offered for sale at a public auction and had been purchased by petitioner, and petitioner had sole possession of and full title to all the real and personal property used in the operation of the station. Petitioner asked the licensee to sign the assignor's portion of the application, but the licensee declined, so the application was filed as an application for the Commission's consent to an involuntary assignment of the license, and the assignor's portion was omitted. Later, the petitioner remembered the aforementioned rider to the mortgage and, pursuant to it, executed the assignor's portion of the application and filed it with the Commission on July 20, 1967. A copy of the rider was included.

4. By the subject memorandum Opinion and Order, the Commission acted to dismiss an application for its consent to an assignment of the license for KDAN from Radio KDAN, Inc. (hereinafter the licensee) to one Phil Jackson, then the Commission

declared the license forfeit and returned without action the application for its consent to an assignment of the license to the petitioner.

5. The Commission was without authority to return the petitioner's assignment application. The application was entitled to acceptance and consideration under the provisions of Sections 308 and 309 of the Communications Act of 1934, as amended. Whether the execution of the assignor's portion of the application by the proposed assignee was valid, and whether the application involved a violation of the provisions of Section 73.139 of the Commission's Rules, are issues involving questions of fact and law on which the applicant was entitled to a hearing before the application could be dismissed or denied. Under no provision of law did the Commission have the power to return the application without action.

6. The Commission held that the provision of the mortgage rider which empowered the petitioner to sign the assignor's portion of the application,

"...is void ab initio since it attempts to retain for Hansen a reversionary interest in the KDAN license, and as such is expressly forbidden by Section 73.139 of our rules"

This is both a mistaken interpretation and a mistaken application of the rule.

7. The rule in question was adopted pursuant to an order released January 7, 1949 (Docket No. 8774, 14 FR 178). The order made clear that the central point involved was that,

"...under the Communications Act a station licensee is fully responsible for the operation and control of his broadcast station and...he cannot properly divest himself by contract or otherwise of such responsibility."

Accordingly, said the Commission,

"...it is not in the public interest and inconsistent with the nature of the rights conferred... under the Communications Act...for owners of radio stations as part of the consideration for the transfer of such stations, to reserve the right to the use of radio time on the station being sold, to attempt to obtain a right of reverter of license, or to obtain other rights which under the Communications Act can be exercised only by licensees. Churchill Tabernacle vs. Federal Communications Commission, 81 App. D.C. 411, 160 F.2d 244..."

8. Petitioner submits that the foregoing makes clear that the thrust of the rule is to bar a contract provision by which an assignor would purport to secure a right to a reversion or reassignment of the license, and not merely an opportunity to apply for reassignment. This is further borne out by the cited case. There, by the assignment agreement, the assignor was granted an automatic and absolute right to a reversion of the license in the event of default. No provision was made for a public sale of the assets of the station, or for the filing of an application for the prior consent of the Commission to the contemplated reversion. The same point is further borne out by the very language of the rule. What is proscribed is a contract,

"...pursuant to which, as consideration or partial consideration for the assignment of license...the assignor of a station license...retains any right of reversion of the license or any right to the reassignment of the license in the future..."

9. By the mortgage rider involved here, petitioner did not acquire any right to a reversion of the license for station KDAN. What he did acquire was only the security that, in the event of default, and in the event petitioner should wish to apply for reassignment of the license, the licensee could not

cause the assignment application to be defective by refusing to sign the assignor's portion. Thus, Hansen obtained no right of reverter, but only the opportunity to bid for the assets of the station at a public sale, and, if he acquired them, the opportunity to apply to the Commission for its consent to a reassignment of the license with an application which would be complete, i.e., which would not be lacking the assignor's portion because the licensee would refuse to sign it.

10. The Commission has long-established procedures by which it permits and approves sales of stations, including assignments or transfers of control of the licenses involved. When such a sale is made, the most valuable thing the seller agrees to assign or transfer is the license. It is understood, of course, that the license is not an asset in the hands of the seller, and may not therefore be sold for a consideration, but it is nevertheless true that without the assignment or transfer of the license there would be no sale. Now, when selling either tangible assets or capital stock on deferred payments, the seller is permitted to protect himself against a default by the buyer by providing that, in the event of default, the assets or the stock are to be offered for sale at public auction, and the seller is to have the right to bid and to purchase. Surely the seller ought to have a comparable right to protect himself with regard to the license, not by requiring a reverter, or by obtaining a right of reversion, for these would be violations of the rule, but simply by denying to the buyer the opportunity to prevent the filing of an application for the Commission's consent to a reassignment of the license by the simple expedient of refusing to sign the assignor's portion. Such a provision

does not constitute the preservation of a reversionary right. It only enables the seller to present a complete application for the Commission's consent.

11. Petitioner has been unable to find a single reported case, other than the Churchill Tabernacle case cited above, in which the Commission has interpreted and applied the provision of the rule against obtaining reverter rights. A rule of the Interstate Commerce Commission is worth noting, however. It concerns transfers of certificates or permits for the operation of common carriers by water. The rule makes clear that a foreclosure or levy on a permit or certificate in satisfaction of a judgment is not itself objectionable, provided that the ICC approves the transfer upon an application filed in accordance with its rules.^{1/}

12. It is acknowledged that the rules were violated by the failure to inform the Commission of the mortgage rider. Under the rules, this was primarily the responsibility of the licensee, and the failure to report was therefore primarily the fault of the licensee. Even accepting the petitioner also had some responsibility in the matter, the failure to report may not be regarded as a defect which is fatal to the petitioner's right to have the subject assignment application

^{1/} "No attempted transfer of any certificate or permit, whether by means of an attempted pledge of such certificate or permit, or by an action purporting to foreclose a pledge or lease against such certificate or permit, or by an attempt to levy execution against such certificate or permit in satisfaction of any judgment or claim against the holder thereof, shall become effective except upon full compliance with the rules and regulations in this part and until after the Interstate Commerce Commission has approved such transfer upon application as herein provided." 49 CFR 306.10.

considered on its merits.

13. The subject assignment application is again being tendered for filing, simultaneously with this petition, so that it will be available for consideration in the event the relief requested herein is granted.

Accordingly, in view of the foregoing, the Commission is requested to reconsider and to reverse the subject Memorandum Opinion and Order to the extent of (1) holding in abeyance the cancellation of the license for KDAN and (2) accepting and giving due and fair consideration to the application for its consent to an assignment of the license to the petitioner.

* * *

March 29, 1968

* * * * *

PETITION FOR STAY

W. H. Hansen, by his attorney, now petitions for a stay of the effectiveness of the Memorandum Opinion and Order released February 29, 1968 in the above-captioned matter.

1. Pursuant to the said Memorandum Opinion and Order, the Commission acted (1) to declare forfeit the license for station KDAN, and (2) to return without action an application for its consent to an assignment of the license for station KDAN from Radio KDAN, Inc. to this petitioner. A petition for reconsideration of those actions is being filed separately but simultaneously herewith. Pending action on the petition for reconsideration, the Commission will want to prevent the preparation and filing of applications for a construction permit for the facilities of KDAN. The time and money expended in the prepar-

ation of such applications would be wasted and beyond recovery if the Commission should grant the relief requested by the petition for reconsideration.

2. The Commission already has before it one representation that an application would be filed in the event the KDAN frequency were vacated. It is contained in a statement of the California Northwest Broadcast Company which was filed with the Commission on December 13, 1967, under a letter of transmittal from its Washington counsel.

3. Accordingly, in view of the foregoing, the Commission is requested to stay the effectiveness of the subject Memorandum Opinion and Order pending action on the said petition for reconsideration.

* * *

March 29, 1968

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MEMORANDUM OPINION AND ORDER

Adopted May 8, 1968 ; Released May 14, 1968

By the Commission: Commissioner Cox concurring in the result;
Commissioners Loevinger and Wadsworth absent.

1. The Commission has before it (1) a Petition of W. H. Hansen filed on March 29, 1968 for Reconsideration of its Memorandum Opinion and Order (FCC 68-208) released February 29, 1968 concerning Station KDAN, Eureka, California, and, (2) a Petition of Hansen, also filed March 29, 1968, requesting the Commission to stay the effectiveness of its February 29, 1968 action on KDAN pending action on the Petition for Reconsideration.

It should be noted that the Commission received no pleadings from Radio KDAN, Inc., the former licensee of KDAN, or Phil Jackson, the proposed assignee under the defunct assignment application, infra.

2. In its Memorandum Opinion and Order released February 29, 1968, the Commission dismissed the proposed Radio KDAN, Inc.-Jackson assignment application (BAL-6046) on the grounds that it sought to assign the bare KDAN license for a consideration in excess of \$24,000. The Order deleted the KDAN call letters and cancelled the existing license because of prolonged unauthorized silence, thereby making the former KDAN frequency available to other interested parties. The Order also dismissed, as moot, a Petition to Deny directed against the Radio KDAN, Inc. - Jackson assignment filed by the instant petitioner, W. H. Hansen. We noted in our Order that the action in declaring forfeit the KDAN license rendered moot an assignment application filed by W. H. Hansen. It is to this aspect of our previous KDAN decision that the instant Petition for Reconsideration is directed. In it, petitioner Hansen prays that the KDAN license be reinstated so that he can take it by assignment. For clarity, we will set forth here the pertinent language of our February 29 Order:

"On May 17, 1967, Hansen tendered for filing with the Commission an assignment application. The section normally executed by an assignor was missing and the document was never formally accepted for filing. By an 'amendment' dated July 20, 1967, Hansen attempted to correct this flaw by filing the assignor's part of the application, executed by himself. He claimed he was empowered to execute that document because of a provision in a 1959 mortgage contract with the present licensee, which purporting to be a mortgage on the station license itself, gives the mortgagee (Hansen), in the event of default, the right to execute an

assignment application as the mortgagor's attorney in fact.' In our view, such a clause is void ab initio since it attempts to retain for Hansen a reversionary interest in the KDAN license, and as such is expressly forbidden by Section 73.139 of our rules. The extraordinary notion that a station license issued by this Commission is a mortgageable chattel in the ordinary commercial sense is untenable. Furthermore, the alleged mortgage agreement of 1959 was brought to the Commission's attention for the first time in July, 1967, and had never been previously filed with the Commission, as required by our rules. We need not treat of this matter at length, however, because our action today in declaring forfeit the KDAN license renders it moot."

3. Petitioner Hansen argues that the Commission was without authority to refuse to accept his assignment application for filing. As originally filed in May 1967, the Hansen application did not contain a Part I, the section normally executed by an assignor. Since the application was thus incomplete on its face, we hold the Commission properly declined to accept it for filing. Hansen "amended" this application in July 1967 by filing a Part I executed by himself as "attorney in fact" for Station KDAN, Inc. The questions that remain to be decided are whether the July "amendment" cured the defect in the May document, and whether or not the Commission properly refused to accept the July document for filing.

4. For the background, we must go back to the 1959 transaction: Hansen, the owner of KDAN, at that time, applied for and received the written consent of the Commission on June 10, 1959 to the assignment of the license of Radio KDAN, Inc., James Hadlock, President. According to the Petition for Reconsideration: "On June 15, 1959, the parties met to consummate the assignment, and a notice of the consummation was

subsequently filed with the Commission. In the course of the closing, the parties, by agreement, added a rider to the mortgage as follows:

"The mortgage of the FCC license of Radio KDAN is made pursuant to a plan of installment payments by the note which this mortgage secures, which said plan has been approved by order of the FCC. Mortgagor irrevocably appoints mortgagee as mortgagor's attorney in fact for the purpose of applying to the FCC for transfer of said license to the mortgagee in the event of default under this mortgage or the note which the same secures and the exercise of any of the mortgagee's rights hereunder by the mortgagee upon such default."
(emphasis supplied)

Petitioner has stipulated that this "rider" was not at that time filed with the Commission as required by our rules, but this dereliction Hansen lays at the door of Hadlock, his assignee. The Commission first learned of the existence of the rider, as noted above, in July 1967 when Hansen relying on it, executed in Hadlock's name the missing portion of the assignment application. The Commission has consistently held that a broadcast license (as distinguished from a station's plant or physical assets) may not be hypothecated by way of mortgage, lien, pledge, lease, etc. This principle, deriving ultimately from Section 301 of the Communications Act, is firmly rooted in Commission practice, its rationale being that such a hypothecation endangers the independence of the licensee who is and who should be at all times responsible for and accountable to the Commission in the exercise of the broadcasting trust. If this rider had been submitted to the Commission as required by our rule at the time of its origin, it would have been rejected for two vital defects: (1) it purported to mortgage the KDAN license; (2) and it reserved to Hansen a reversionary interest

in the KDAN license, which license had passed from Hansen to Hadlock's Radio KDAN, Inc. company pursuant to a Commission grant. Can this rider now be used by Hansen to validate an otherwise defective assignment application? We hold that it cannot.

5. The Hansen Petition for Reconsideration argues that the rider did not retain for Hansen a reversionary interest in the KDAN license but merely "security that, in the event of default, and in the event that petitioner should wish to apply for reassignment of the license, the licensee could not cause the assignment application to be defective by refusing to sign the assignor's portion." We cannot accept so narrow an interpretation of the sweeping language of the rider itself. In interpreting its prohibition on reversions contained in Sections 73.139 (for AM), 73.241 (for FM) and 73.659 (for TV), the Commission has consistently refused to grant applications for the transfer of control of a corporate licensee or for an assignment of a station license where a former owner or licensee has retained by contract or understanding, oral or written, a right or a power to regain the status of licensee through a reversion of stock control or the reassignment of the station license in the event of default by the purchaser, or upon the happening of some other contingency. Our policy is that a transferee or assignee (buyer) must be free to dispose of the control of the corporation or the station license without the consent of the seller, or former owners. (See: In re The Yankee Network, Inc., 1949, 5 RR 216, 13 FCC 1014.) The fact that such an agreement or contract provision is made dependent

on Commission approval does not cure its basic defect. The rider under discussion gives Hansen an almost automatic reversion: upon default, he automatically steps into the shoes of his assignee, Hadlock, and becomes Hadlock's "attorney in fact" for the single object of effecting a reassignment of the KDAN license. Under the rider, Hadlock, once he had defaulted, loses control of the license and can say nothing more concerning its assignment. Coupled with its extraordinary language concerning the "mortgaging" of the license itself, the fact that the rider was brought to the attention of the Commission more than eight years after its execution creates the inference that the petitioner from the outset realized the inherent weakness of the rider. Had it been presented to the Commission as part of the 1959 assignment package, it would have been rejected out of hand. We hold it cannot now be used as a vehicle to effect the reassignment of the KDAN license to Hansen.

6. Hansen argues that whatever the merits of the 1959 rider, questions of fact are presented which demand the scrutiny of a hearing, i.e., whether the rider gave Hansen a right of reversion, whether it is prohibited as such by Section 73.139 of our Rules. We find no merit in this contention; in our view, no undetermined question of fact remains.

7. For the reasons set forth above, IT IS ORDERED that the Petition for Reconsideration filed by W. H. Hansen on March 29, 1968 is hereby DENIED; the Petition for Stay filed on March 29, 1968 is hereby DISMISSED as moot.

BY DIRECTION OF THE COMMISSION

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Selected Contract Provisions

Following are the pertinent security provisions in a number of contracts which the Commission has approved in granting applications for its consent to an assignment of the license for a station (which normally accompanies a sale of the assets) or a transfer of control of a licensee corporation (which normally involves a sale of the capital stock of the corporation). The examples here were drawn from a random sampling of such applications granted within the past ten years. In all instances, the contracts involved provisions for deferred payment of a major portion of the purchase price, followed by security provisions intended to protect the seller in the event of default. The deferred obligation was to be evidenced by a promissory note which, in turn, was to be secured by a mortgage on the assets sold, or a pledge of stock - either the stock of the licensee, when the stock was the subject of the sale, or the stock of the assignee, where the assets and the license were to be assigned to a corporation. Appellant is setting forth here instances of security provisions which the Commission approved. Appellant found no instance in which the Commission dismissed an application on the ground that the contract contained provisions violative of Section 73.139, 73.241 or 73.659 of its Rules.

(1)

Assignment of the license for standard broadcast station WWOK, Charlotte, North Carolina, from Carmen Macri to Radio Charlotte, Inc.

Application filed June 19, 1958, granted July 30, 1958, file number BAL-3080.

The contract (Exhibit 2 of the application) provided:

"22. Benefit...

"(b) The payment of the promissory note provided for in paragraph 3(c) hereof shall be further secured by a pledge of all the issued and outstanding stock of the corporation, and any subsequently issued stock..."

(2)

Assignment of the license for standard broadcast station WPET, Greensboro, North Carolina, from Guilford Advertising, Inc. to WPET, Inc.

Application filed October 23, 1959, granted November 25, 1959, file number BAL-3679.

The contract (Exhibit 3 of the application) provided:

"18. At the CLOSING DATE the corporate buyer and its stockholders shall pledge with...[a bank] ...all of the shares of stock which have been issued by the corporate buyer as further security for the note...In event of default [the bank] shall sell these shares at public auction...the SELLER or any of its stockholders may, if they wish, bid at that auction, applying toward the purchase price the unpaid balance due on the note..."

(3)

Transfer of control of Northeast Radio Corporation, by a sale of all its stock from Cooperative Grange League Federation Exchange, Inc. to Ivy Broadcasting Company, Inc.

Application filed August 5, 1959, granted January 6, 1960,
file number BTC-3205.

The contract (Exhibit No. 8) provided:

"10. ESCROW OF STOCK. At the closing of the purchase and sale of Northeast stock as hereinabove provided, G.L.F. will deliver to Northeast certificates for all of the shares of stock sold to Ivy, duly endorsed and with stock transfer stamps affixed...

"In the event Ivy defaults in the performance of the material terms and conditions of this agreement, including the installment payments on the purchase price as hereinabove provided...the Escrow Agent shall thereupon offer said stock for public sale..."

(4)

Transfer of control of South Shore Broadcasting Corporation, licensee of standard broadcast station WJOB, Hammond, Indiana, by a sale of all but 14 shares of its capital stock out of 3,504 shares issued and outstanding from three of the four stockholders to the Colby Broadcasting Corporation.

Application filed December 9, 1959, granted January 20, 1960, file number BTC-3313.

The contract (Exhibit 1 of the application) provided for notes of the buyer in the form attached as an exhibit, and the attachment, designated "Collateral Note", provided that it was secured by a pledge and a deposit in escrow of specified shares of the capital stock of the Colby Broadcasting Corporation, and provided further that:

"7. In the event the undersigned shall default... and on the written demand of the said holder or holders, the escrowee shall proceed to sell all of the certificates...at public sale for cash only... The holder or holders of this note...shall have the right to purchase the shares at any sale held pursuant to the provisions of this note upon making the highest bid..."

(5)

Transfer of control of WGLI, Inc., licensee of standard broadcast station WGLI and FM broadcast station WTFM, Babylon, New York, by a sale of all its capital stock from William H. Reaman, et al., the three stockholders, to Friendly Frost, Inc.

Application filed January 19, 1960, granted February 10, 1960, file number BTC-3355.

The contract (Exhibit No. 1 of the application) provided:

"FOURTH:...

"C. (1)...to further secure the payment of the promissory notes...and the performance of the terms of this Agreement, the Buyer shall, at the closing, deposit with..[an escrowee]...all the stock of the Licensee purchased by the Buyer, duly endorsed for transfer...

"EIGHTEENTH...

"(b) If there be a default by the Buyer...then the Escrowee may...sell such stock or any part thereof at public auction sale...at which sale the Sellers may bid and purchase..."

(6)

Transfer of control of WMFS, Inc. licensee of standard broadcast station WMFS, Chattanooga, Tennessee, by a sale of all its stock from B. F. J. Timm to Leon S. Walton.

Application filed January 19, 1960, granted February 10, 1960, file number BTC-3358.

The contract (Exhibit 1 of the application) provided:

"...The unpaid balance of \$140,000.00 shall be evidenced by collateral note signed by Purchaser ...and all of said stock shall be collateral security to said note."

(7)

Transfer of control of Air Waves, Incorporated, licensee of standard broadcast station WJOC, Jamestown, New York, by a sale of stock representing 50.6% of its capital stock from Harold P. Kane and Frederick E. Davis, to Taylorradio Corporation.

Application filed June 8, 1961, granted July 19, 1961, file number BTC-3770.

The contract (Exhibit No. 1 of the application) provided:

"3...Payment of said notes shall be secured by the stock delivered, endorsed in blank..In the event of foreclosure it is understood that stock will be sold at public sale."

(8)

Transfer of control of Queen City Broadcasting Company, licensee of standard broadcast station KIRO, FM broadcast station KIRO-FM, and television station KIRO-TV, Seattle, Washington, by a sale of 129,000 shares of stock representing 50.215% of the total capital stock outstanding from Saul Haas to Wasatch Radio and Television Company.

Application filed September 3, 1963, granted September 18, 1963, file number BTC-4362.

The contract (Exhibit No. 2 of the application) provided:

"1.02 Purchase Price...The unpaid balance of the purchase price and interest thereon shall be secured by a pledge of the 129,000 shares...substantially in the form of Pledge Agreement, being Exhibit D hereto attached and made a part hereof."

The attached form of pledge agreement provided:

"3. In case the Pledgor shall default in the payment of the indebtedness hereby secured... Pledgee may at any time thereafter...sell the shares pledged...The sale...may be at public or private sale, with right in the Pledgee to become a bidder at such sales..."

(9)

Assignment of the license for standard broadcast station WLAP and FM broadcast station WLAP-FM, Lexington, Kentucky, from Thoroughbred Broadcasting Company to Thoroughbred Broadcasters, Inc.

Application filed February 26, 1963, granted October 9, 1963, file number BAL-4744.

The contract (Exhibit 6 of the application) provided:

"4. Notes and Security:...The said notes shall be secured by...(ii) a pledge of all of Buyer's stock, in accordance with the terms of the Pledge Agreement annexed as Exhibit H hereto."

Exhibit H provided:

"1...In the event of any default...Pledgee... may sell such shares...at any one or more sales ...At any such sale or sales the Pledgee or anyone else may be the purchaser of any or all of the shares of stock..."

(10)

Transfer of control of Neenah-Menasha Broadcasting Co., Inc., licensee of standard broadcast station WNAM, Neenah-Menasha, Wisconsin, by a sale of all its capital stock from S. N. Pickard to WNAM, Inc.

Application filed May 20, 1963, granted October 9, 1963, file number BTC-4298.

The contract (Exhibit No. 8 of the application) provided:

"2...

"(c) To secure the payment of the \$319,500 balance of the purchase price the certificates representing the shares of stock of the Company being purchased by the Buyer from the Seller will be deposited in escrow...In the event of default in payment of principal or interest...the escrow agent shall sell at public sale to the highest bidder as many of the shares of stock as may be necessary to pay the expenses of such sale and the amount due Seller..."

(11)

Assignment of the license for standard broadcast station KMIN, Grants, New Mexico, from Grants Broadcasting Company, Inc. to KMIN, Inc.

Application filed May 15, 1964, granted October 7, 1964, file number BAL-5109.

The contract (Exhibit No. 7 of the application) provided:

"5. The Purchaser agrees...

"(h) Said promissory note...shall be secured by a security agreement pertaining to all of the issued and outstanding stock of KMIN, Inc...upon the form marked Exhibit "C" attached hereto...and shall be in compliance with all applicable rules, regulations and orders of the FCC. In the event of any conflict...the said form of security agreement shall be changed to comply with said applicable rules, regulations and orders of the FCC. Said form of security agreement shall be submitted to the FCC with said joint application."

The attached security agreement provided, at Page 6:

"Upon...default...the escrow agent shall immediately deliver to the Secured Party possession of the Collateral...the Secured Party...will give the Debtors reasonable notice of the time and place of any public sale thereof or of the time after which any private sale or any other intended disposition is to be made...In the event that the sale of said Collateral is made at a bona fide public sale, the holder and owner of said note...shall be free to purchase all or any part of the Collateral..."

(12)

Assignment of the license for standard broadcast station KPAM and FM broadcast station KPFM, Portland, Oregon, from Chem-Air, Inc., to Romito Corp.

Application filed September 23, 1965, granted October 29, 1965, file numbers BAL-5580 and BALH-828.

The contract (Exhibit E of the application) provided:

"3. Purchase Price...

"(d) To secure its full performance, under this Agreement, the Buyer agrees to execute and deliver to Seller at the time of closing the following documents:...

"(2) A pledge (or equivalent security device) to Chem-Air of all stock now or subsequently issued to Buyer. All of Buyer's stock certificates shall...be placed with an Escrow Agent ...In the event of default, the pledged stock shall be offered for sale at a public auction at which Seller may participate..."

(13)

Assignment of the license for standard broadcast station KTHS, Berryville, Arkansas, from Ozark Radio and Equipment, Inc. to KTHS, Inc.

Application filed October 29, 1965, granted January 5, 1966, file number BAL-5625.

The contract (Exhibit 4 of the application) provided:

"2. The purchase price...shall be paid as follows...(c)...by the delivery of a 6% promissory note...Such note...shall be secured by the pledge of all of the issued and outstanding shares of capital stock of the Buyer."

(14)

Transfer of control of Russell G. Salter, Inc., licensee of standard broadcast station WIXN and FM broadcast station WIXN-FM, Dixon, Illinois, by a sale of all of its capital stock (500 shares) from Lloyd Burlingham and Robert L. Harris to Harry Campbell, Dolph Hewitt, Donald Blanchard and Norbert A. Drake.

Application filed October 27, 1965, granted January 18, 1966, file number BTC-4946.

The contract (Exhibit 3 of the application), provided:

"14. SECURITY. As security to guarantee the performance of this purchase agreement the Buyer's agree, at the time of settlement to execute a Trust Indenture for the benefit of the Sellers pledging, exclusive of voting rights, four hundred seventy (470) shares of the common stock of Russell G. Salter, Inc...and further pledging all the physical assets, both real and personal of Russell G. Salter, Inc..."

(15)

Assignment of the license for FM broadcast station WOLI, Ottawa, Illinois, from the Ottawa Broadcasting Company to the WOLI Broadcasting Corp.

Application filed November 8, 1967, granted January 19, 1968, file number BALH-1041.

The contract (Exhibit No. 2 of the application) provided:

"11. SECURITY. (A) As Security to guarantee the performance of this agreement...on the day of settlement the Buyers shall execute a chattel mortgage on the physical properties of F.M. radio station W.O.L.I. ...together with a Trust Indenture for the benefit of the Sellers, pledging, exclusive of voting rights, stock representing a 90% ownership interest in WOLI Broadcasting Company, the successor licensee to said F.M. radio station WOLI."

By an amendment which was filed with the Commission on January 16, 1968, the contract was modified to provide that:

"...in the event of a default...the common stock pledged as security...shall be sold at a Public Sale..."

(16)

Assignment of the license for standard broadcast station WKDN, Camden, New Jersey, from the South Jersey Broadcasting Company to the Roberts Broadcasting Company.

Application filed April 8, 1968, granted on June 4, 1968, file number BAL-6339.

The contract (Exhibit No. 4 of the application) provided:

"4...The payment of said promissory note shall be further secured by the pledge to...[an escrow agent]...of all the issued and outstanding stock of Purchaser..."

(17)

A transfer of control of Versluis Radio & Television, Inc., licensee of standard broadcast station WLAV and FM broadcast station WLAV-FM, Grand Rapids, Michigan, by a sale of all its capital stock and debentures from Leonard A. Versluis to Milton W. Bush, et al., d/b as Stephens-Wismer Broadcasting Company.

Application filed June 24, 1968, granted July 16, 1968, file number BTC-2823.

The contract (Exhibit 1S of the application) provided:

"8. The purchaser shall assign to Seller as security for the payment of the indebtedness described in paragraph 2 the stock and debentures described in paragraph 1. The assignment shall provide for sale at public auction in the event of default with seller to have the right to bid at such sale. It is hereby agreed that the Federal Communications Commission licenses will be assigned to the highest bidder at such public sale."

(18)

Assignment of the license and an outstanding construction permit for standard broadcast station WORD, Spartanburg, South Carolina, from WORD, Inc. to Henderson Belk.

Application filed February 20, 1961, granted April 5, 1961, file number BAPL-229.

The contract (Exhibit F of the application) provided:

"4...Said promissory note shall also be secured by a first mortgage covering all of the real and tangible personal property to be conveyed hereunder...Said mortgage...shall provide that, in the event of default, the mortgaged property will be sold in accordance with local law at public sale, that no purchaser of the mortgaged assets will be permitted to operate WORD without having first obtained the consent of the Commission to the assignment of licenses therefor, and that, if requested, mortgagor will execute any and all applications and other instruments requisite for obtaining the consent of the Commission and for assigning the licenses for WORD to the purchaser of the mortgaged assets."

(19)

Assignment of the license for standard broadcast station WDCL, Tarpon Springs, Florida, from Clearwater Broadcasting Corp. to Consolidated Communities Corporation.

Application filed April 26, 1961, granted June 21, 1961, file number BAL-4218.

The contract (assignee's Exhibit D in the application) provided:

"9. As security for Corporation's faithful performance of the covenants of this Agreement and the payment of said promissory note, all of the Corporation's stockholders shall place all of their shares of Corporation's capital stock...in escrow...Said pledge agreement shall provide that ...in the event of default, said stock may be sold

at the request of Seller, by the escrow bank at public auction, subject to necessary approval of the Federal Communications Commission. If such Commission approval shall be necessary, Corporation and its stockholders shall cooperate fully in the preparation and filing of an application before the Commission for consent to the transfer of control or the assignment of license of Station WDCL to whoever shall have purchased the Corporation's shares at public auction...

"10. So long as any balance on said promissory note remains unpaid, Corporation shall covenant and agree that:...

"(f) Corporation will not assign, transfer or otherwise dispose of its license or other operating authority from the Commission for Station WDCL, except with the permission of Seller..."

On January 8, 1964, two applications were filed, one for consent to a transfer of control of the licensee (BTC-4478), and another for an assignment of the license (BAL-5004). In Attachments B and E of BTC-4478, it was explained that Consolidated (the buyer above) had defaulted, that its stock which had been held in escrow had been sold at public auction, that Clearwater (the seller above) had been the successful bidder, and that it sought approval of the transfer of control in order that it might simultaneously sell the assets and assign the license to a third party, Pinellas Broadcasters, as proposed in BAL-5004. Attachment E contained the statement:

"...In order to mitigate its losses insofar as possible, Clearwater proposes to assign the license and physical assets of WRBB¹/ to Pinellas. Clearwater seeks to obtain this ultimate assignment without operating WRBB and without even controlling the WRBB license except momentarily for the purpose of passing title. Clearwater will be a mere conduit for the purpose of passing title to the ultimate proposed licensee, Pinellas."

¹/ Formerly WDCL.

The two applications were granted by the Commission on June 17, 1964.

(20)

Transfer of control of Wisconsin Broadcasters, Inc., licensee of station WFOX, Milwaukee, Wisconsin, by a sale of all its capital stock to Fox Broadcasting Corporation.

Application filed May 21, 1962, granted October 24, 1962, file number BTC-4058.

The contract (Exhibit 7 of the application) provided:

"BUYER'S Covenants: As long as any of the indebtedness to SELLERS...remains unpaid, BUYER covenants and agrees that:

"(a) All of the issued and outstanding capital stock of COMPANY...shall be deposited with the ESCROW AGENT with instructions to hold same in accordance with the ESCROW AGREEMENT.

"(d) COMPANY...shall be the licensee of station..."

The escrow agreement referred to contained the following provision:

"4. In the event that there is a default of the note or notes held hereunder...the ESCROW AGENT, at the written request of SELLERS' AGENT shall sell at public sale as many of the shares of stock held hereunder as may be necessary to pay the expenses of such sale and the amount due SELLERS and shall apply the proceeds of such sale to the payment of such amounts and deliver any excess of such proceeds and any shares of stock remaining unsold to BUYER. The sale shall take place at the offices of the ESCROW AGENT and the shares offered for sale shall be sold to the highest bidder. The ESCROW AGENT shall give SELLERS' AGENT and BUYER twenty (20) days' notice by registered mail of the time and place of any such sale..."

(21)

Assignment of the license for standard broadcast station KENO, Las Vegas, Nevada, from the Paradise Broadcasting Company, Inc., to VRA Enterprises, Inc.

Application filed February 27, 1963, granted June 19, 1963, file number BAL-4746.

The contract (Exhibit 3 of the application) provided:

"5. SECURITY. The unpaid balance of the purchase price evidenced by the aforesaid promissory notes in favor of the Seller shall be secured by:

"(a) A chattel mortgage executed by the Buyer to the Seller of all the personal property listed in Exhibit A attached hereto, and of all of the personal property hereafter acquired by the Buyer and used in the operation of station KENO, and all replacements or improvements of or to existing property...

"(b) A pledge agreement from all of the stockholders, pledging their corporate stock with the Seller in the form of the pledge agreement set forth in Exhibit E attached hereto...

"(d) Said chattel mortgage, stock pledge agreement and promissory notes shall each further provide that upon any default in the payments required thereunder...and the stock pledge is sold to satisfy the indebtedness, the Buyer, transferee or holder of said license and permits shall cooperate in the prompt preparation and submission of an appropriate application to the Federal Communications Commission, including furnishing all of the required information needed for the Federal Communications Commission for said application, all without cost or expense to Seller."

(22)

Assignment of the license for standard broadcast station WTSA, Brattleboro, Vermont, from Tri-State Area Broadcasting Corporation to Brattleboro Broadcasting Corporation.

Application filed October 3, 1963, granted November 29, 1963, file number BAL-4928.

The contract (Exhibit 4 of the application) provided:

"8. Notwithstanding anything else contained herein to the contrary, the Buyer agrees with the Seller that in the event of default in the payment and/or performance of the aforementioned mortgage note or of any of the security documents relating thereto and the taking of steps or institutions of proceedings (judicial or non-judicial) to realize on or obtain the benefit of the security provided thereby, or any thereof, the Buyer shall render full co-operation necessary or desirable to enable the holder of said security and/or the purchaser thereof on sale of said security to succeed to or otherwise acquire the necessary license from the Federal Communications Commission to operate said radio station. Said co-operation shall include, but without limitation, the signing, sealing and delivery of papers required by said Commission to obtain a transfer or assignment of such license...."

(23)

Assignment of the license for standard broadcast station WMMN, Fairmont, West Virginia, from Peoples Broadcasting Corporation to Broadcast Enterprises, Inc.

Application filed September 3, 1963, granted December 6, 1963, file number BAL-4894.

The contract (Exhibit C of the application) contained, as an attachment, a form of agreement for the pledging of the stock of the buyer to secure the payment of the deferred installments. The form further provided:

"In the event the principal...is not paid at maturity...the undersigned authorizes the escrow agent to...sell all the said stock...or cause the same to be done at a public sale...and PEOPLES BROADCASTING CORPORATION is authorized to purchase said stock...for its own protection..."

"The undersigned do hereby constitute and appoint Benito Gaguine, Esq. the true and lawful attorney irrevocably for the undersigned, to...sell all or any part of said stock...and for that purpose to make and execute all necessary acts of assignment and transfer, to execute and deliver all conveyances, contracts, assignments and things

required to be done for and on behalf of BROADCASTING ENTERPRISES, INC. to constitute an effective transfer of control of said capital stock..."

(24)

Assignment of the license for standard broadcast station WDZ, Decatur, Illinois, from Mid-States Broadcasting Co. to Stephen P. Bellinger, et al., dba Prairieland Broadcasters.

Application filed June 24, 1963, granted December 12, 1963, file number BAL-4841.

The contract (Exhibit No. 5 of the application) provided:

"5...In the event of default in payment of said note or any part thereof...then Seller may...demand of Buyer that...Buyer shall sell its interest in the radio station...at a public sale and thereafter take all steps necessary to secure approval of the Commission to the assignment of the license for said station..."

(25)

Transfer of control of Grayson Enterprises, Incorporated, licensee of standard broadcast station KLBK and television station KLBK-TV, Lubbock, Texas, and television station KWAB-TV, Big Spring, Texas, by a sale of all its capital stock from Nat Levine, et al., the stockholders, to Lee Optical, et al., the purchasers.

Application filed June 27, 1963, granted March 25, 1964, file number BTC-4326.

The contract (Exhibit No. 4 of the application) provided:

"3. STOCK PLEDGE

"Purchasers agree that at the closing they will deliver to Morris I. Jaffe, hereinafter referred to as "Depository", all of the shares of capital stock being sold by the Sellers hereunder..."

"(c) Should Purchasers or any of them default in making any payment on any of the obligations... Depository shall, upon instructions from any Seller, cause all of the stock to be sold for the account of Purchasers at public sale...without limitation on the right of any Seller becoming a purchaser at such sale...In the event of default and sale, Purchasers will take all reasonable and necessary steps to assist in obtaining Commission's approval of transfer of control of Licensee or its successor to whomsoever may be the purchaser at such sale..."

(26)

Assignment of the license for standard broadcast station WNVY, Pensacola, Florida, from Radio Pensacola, Inc., to Pensacola Broadcasting Corporation.

Application filed November 25, 1964, granted January 28, 1965, file number BAL-5302.

The contract (Exhibit No. 3 of the application) provided:

"8. Notwithstanding anything else contained herein to the contrary, the Buyer agrees with the Seller that in the event of default in the payment and/or performance of the aforementioned mortgage note or of any of the security documents relating thereto and the taking of steps or institutions of proceedings (judicial or non-judicial) to realize on or obtain the benefit of the security provided thereby, or any thereof, the Buyer shall render full co-operation necessary or desirable to enable the holder of said security and/or the purchaser thereof on sale of said security to succeed to or otherwise acquire the necessary license from the Federal Communications Commission to operate said radio station. Said co-operation shall include, but without limitation, the signing, sealing and delivery of papers required by said Commission to obtain a transfer or assignment of such license..."

(27)

Assignment of the license for standard broadcast station WLOB and FM broadcast station WLOB-FM, Portland, Maine, from Casco Broadcasters Corp. to Portland Broadcasting Corporation.

Application filed December 23, 1964, granted February 24, 1965, file numbers BAPL-324 and BALH-750.

The contract (Exhibit C of the application) provided:

"8. Notwithstanding anything else contained herein to the contrary, the Buyer agrees with the Seller that in the event of default in the payment and/or performance of the aforementioned mortgage note or of any of the security documents relating thereto and the taking of steps or institutions of proceedings (judicial or non-judicial) to realize on or obtain the benefit of the security provided thereby, or any thereof, the Buyer shall render full co-operation necessary or desirable to enable the holder of said security and/or the purchaser thereof on sale of said security to succeed to or otherwise acquire the necessary license from the Federal Communications Commission to operate said radio station. Said co-operation shall include, but without limitation, the signing, sealing and delivery of papers required by said Commission to obtain a transfer or assignment of such license..."

(28)

Assignment of the license for standard broadcast station WGBF, Evansville, Indiana, from WGBF, Inc. to Radio Station WGBF, Inc.

Application filed February 23, 1965, granted April 5, 1965, file number BAL-5367.

The contract (Exhibit 6-A of the application) provided:

"4...

"e. Said balance shall be secured by a security agreement on the property...

"19...

"b. In the event of a default...if the assets are sold at a public or private sale, Buyer agrees that it will join with the purchaser at any such sale in an application to the Federal Communications Commission for consent to the assignment of the license to the purchaser at any such sale, and Buyer agrees to prosecute such application in conjunction with such purchaser."

(29)

Assignment of the licenses for standard broadcast station WCUM and FM broadcast station WCUM-FM, Cumberland, Maryland, from Alleghany County Broadcasting Corp. to Group "B" Broadcasting Co., Inc.

Application filed April 14, 1965, granted June 18, 1965, file numbers BAL-5427 and BALH-783.

The contract (Exhibit No. 5 of the application) provided:

"20. In the event of default after closing by Buyer, and appropriate foreclosure under the mortgages provided for herein, or sale of the pledged stock by Seller at public auction... Buyer agrees to cooperate fully with Seller in assigning the licenses of the stations to the purchaser of the fixed assets or stock, as the case may be, and will execute promptly such applications as may be required to secure the necessary approval of the Commission."

(30)

Assignment of the licenses for standard broadcast station KCUL and FM broadcast station KCUL-FM, Fort Worth, Texas, from Dalworth Broadcasting Company, Inc. to John B. Walton, Jr.

Application filed April 26, 1966, granted July 27, 1966, file numbers BAL-5957, and BALH-895.

The contract (Exhibit No. 7 of the application) provided, at Paragraph 2(e):

"Said mortgage or mortgages shall further provide that, in the event of default, the Buyer and/or his assigns shall cooperate in the execution and submission of an application to the Federal Communications Commission to assign all the licenses... to the purchaser of the mortgaged assets at the mortgage foreclosure sale..."

(31)

Assignment of the license for standard broadcast station WMAK, Nashville, Tennessee, from LIN-Medallion Pictures Corporation to MOONEY-WMAK, Inc.

Application filed August 21, 1967, granted October 19, 1967, file number BAL-6148.

The contract (Exhibit E of the application) provided that, among other things, the buyer would deliver at the closing a pledge of its stock, in the form of an attached Exhibit "M". The form attached provided:

"5. Defaults

"In the event of any default by the BUYER in the performance of any of its obligations under this agreement or the promissory notes secured thereby...SELLERS may direct the Escrowees hereinbefore named to sell the deposited stock or any part thereof at public sale...the SELLER may purchase the whole or any part of the collateral sold...the Escrowees shall not consummate the sale of said stock unless the Federal Communications Commission has approved any necessary application for consent to transfer of control. Pledgor hereby agrees that it will cooperate with Escrowee and SELLER in obtaining consent and will sign all applications and provide all information necessary to obtain such consent."

(32)

Assignment of the license for standard broadcast station KKIS, Pittsburg, California, from Coastal Communications Corporation to Norcal Broadcasting Corporation.

Application filed March 29, 1968, granted July 5, 1968, file number BAL-6336.

The contract (Exhibit No. 6 of the application) provided:

"4. The purchase price...

"(h) In addition to any other remedies Seller may have in the event of default by Buyer on the note to Seller, Seller shall have the right, and Buyer hereby agrees to assist Seller, to obtain the transfer and assignment to Seller of all FCC broadcasting licenses, authorization and permits then held by Buyer for Radio Station KKIS."

(33)

Transfer of control of the Pioneer Broadcasting Company, licensee of standard broadcast station KONI, Spanish Fork, Utah, by a sale of all its capital stock from Sterling O. Bucher, et al., the four stockholders, to George K. Culbertson and Charlotte L. Culbertson.

Application filed January 29, 1962, granted April 18, 1962, file number BTC-3966.

The contract (Exhibit A-1 of the application) provided:

"3. It is mutually agreed that...stock certificates representing the stock hereinbefore referred to, endorsed in blank, shall be placed in escrow...to be delivered to the Buyers or returned to the Sellers forthwith in accordance with the terms and conditions hereinafter set forth...

"9. In the event that the Buyers shall default in the payment of any of the sums due hereunder or in the performance of any obligations set forth hereunder...the escrow holder shall be instructed to return all stock certificates deposited therewith to the Sellers..."

(34)

Assignment of the license for standard broadcast station KRDS, Tolleson, Arizona, from Eldred O. Smith and Thelma D. Smith to Southwestern Broadcasters, Inc.

Application filed March 29, 1968, granted July 5, 1968,
file number BAL-6336.

The contract (Exhibit No. 3A) provided, at Paragraph 2(d),

"Said promissory note shall be secured by a security agreement encumbering the personal property hereby agreed to be sold..."

and at Paragraph 14(b),

"In the event that the total amount owing to SELLER because of said breach is not satisfied within thirty (30) days after being declared due and owing, then SELLER or its assigns may proceed against BUYER through said promissory notes. In addition, SELLER or its assigns may then also declare the security agreement given under this AGREEMENT in default, and proceed against the personal property secured thereby. In the event that SELLER or its assigns shall as a result of such default cause the foregoing property to be sold to a third party, SELLER or its assigns may request, subject to approval by COMMISSION, and BUYER shall comply with said request, that BUYER assign the license to KRDS for the consideration of One Dollar (\$1.00), to the third party purchaser of said property."

(35)

Assignment of the licenses for standard broadcast station KFML and FM broadcast station KFML-FM, Denver, Colorado, from Fine Arts Broadcasting Co., Inc. to O'Fallon-O'Connor Broadcasting, Inc.

Application filed December 30, 1965, granted February 25, 1966, file numbers BAL-5663 and BALH-858.

The contract (Exhibit No. 5 of the application) provided, at Paragraph 1.H.,

"As additional security, the Buyer shall execute and deliver to Seller at closing a chattel mortgage or mortgage or mortgages upon all personal property of Seller..."

and at Paragraph 11,

"In the event of any default in payments on Buyer's promissory note to Seller, or in the event of breach of any of Buyer's agreements hereunder, Seller may foreclose upon its security. The form of all security agreements shall be subject to the reasonable satisfaction of Seller. The broadcast authority on which Seller's business rests is not subject to transfer merely by assignment on foreclosure, as Federal Communications Commission approval is required for transfer. However, such broadcast authority shall be included in the chattel mortgage(s). If Seller forecloses on the security deriving from this contract, Buyer shall cooperate with the prevailing bidder at foreclosure for the purpose of transferring the broadcast authority to the prevailing bidder."

(36)

Assignment of the licenses for standard broadcast station KDLK and KDLK-FM, Del Rio, Texas, from Queen City Broadcasting Company to Western Plains Broadcasting Co., Inc.

Application filed December 6, 1967, granted April 30, 1968, file numbers BAL-6263 and BALH-1062.

The contract (Exhibit C of the application) provided:

"1. The term 'The Property' is, for the purpose of this contract, defined to mean, and is intended to mean, all physical properties, leases, licenses, permits and easements which the Seller now owns or holds in connection with said radio broadcasting stations..."

The agreement goes on to provide for three promissory notes (Paragraph 3), two of which are to be "...secured by a mortgage lien and vendor's lien against all The Property..."

RIDER TO MORTGAGE OF CHATTELS
RADIO KDAN, INC., a California
Corporation, to WILLIAM H. HANSEN,

Dated June 15, 1959

11. This mortgage shall cover all property described herein whether the same is real or personal. The same specifically refers to but is not limited to the Lease and Option Agreement described in EXHIBIT B hereof...

If Mortgagor exercises the option for the purchase of said property and said property is conveyed to Mortgagor or Mortgagor becomes the owner, legal or equitable, of the property described in EXHIBIT B attached hereto, then this mortgage shall be a mortgage of real property covering said property described in EXHIBIT B...

Upon default by Mortgagor, Mortgagee shall have all of the rights set forth in this mortgage which are authorized by law to be exercised by Mortgagee in a mortgage of real property; and in addition thereto, without limiting the foregoing, Mortgagee shall have the right, as Mortgagee's option, immediately to sell any or all of said property at non-judicial sale in the manner provided by Section 2924 of the Civil Code of the State of California...Mortgagor hereby irrevocably appoints Mortgagee as Mortgagor's attorney with full power of substitution and revocation for the purpose of taking possession of all of the property herein described...and of operating said property



pending sale of the same and of selling said property at any non-judicial sale in accordance with this mortgage.

12. The mortgage of the Federal Communications Commission license of Radio Station KDAN is made pursuant to a plan of installment payments represented by the note which this mortgage secures, which said plan has been approved by order of the Federal Communications Commission. Mortgagor irrevocably appoints Mortgagee as Mortgagor's attorney in fact for the transfer of said license to Mortgagee in the event of the default by Mortgagor under this mortgage or the note which the same secures and the exercise of any of Mortgagee's rights hereunder by Mortgagee upon such default.

13. Mortgagor agrees that Mortgagor shall not sell, otherwise dispose of, or cause, or suspend operation of Radio Station KDAN without written consent of Mortgagee. Mortgagor also agrees to comply at all times with the Federal Communications Commission license for Radio Station KDAN...

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
United States Court of Appeals
for the District of Columbia Circuit

No. 22,013

FILED SEP 3 1968

Nathan J. Paulson
CLERK

W. H. HANSEN,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

APPEAL FROM MEMORANDUM OPINION AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

SEYMOUR M. CHASE

Suite 308, Brawner Building
888 17th Street, N. W.
Washington, D. C.

Attorney for Appellant

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STATUTES:

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STATEMENT OF ISSUES PRESENTED

1. Did the Commission err in dismissing appellant's assignment application without a hearing?
2. Did the Commission correctly invoke and apply its rule against the retention by an assignor of any reversionary interest in an assigned license?

The instant case has not previously come before this Court.

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from actions by which the Federal Communications Commission cancelled the outstanding license for standard broadcast station KDAN at Eureka, California, and dismissed without hearing an application for the Commission's consent to an assignment of the license to this appellant, W. H. Hansen.

The Commission had before it for consideration two applications, one being an application for its consent to an assignment of the license for KDAN from the licensee, Radio KDAN, Inc., to one Phil Jackson, and the other being an application for the Commission's consent to an assignment of the license from Radio KDAN, Inc. to Hansen. By a memorandum opinion and order released on February 29, 1968, the Commission dismissed the Jackson assignment application, declared the license to be forfeited, then dismissed the Hansen assignment application.

A. 13. On March 29, 1968, Hansen filed a petition for reconsideration and a petition for stay, both of which the Commission denied by a memorandum opinion and order released May 14, 1968.

A. 17, 23, 24.

Relevant Facts

On March 16, 1959, Hansen, then the owner and licensee of station KDAN, entered into an agreement for a sale of the station to Radio KDAN, Inc. The agreement contemplated a sale of the

real and personal property of the station, and an assignment of the outstanding license. The terms involved a down payment, and a promissory note for payment of the balance in deferred installments. An appropriate application for the consent of the Commission was filed, and was granted on June 10, 1959.

A. 14. When, on June 15, 1959, the parties met to consummate their agreement, Radio KDAN, Inc. made the required down payment and gave Hansen the promissory note called for by the agreement. In addition, as security for the note, Radio KDAN, Inc. gave Hansen a mortgage of the properties involved.^{1/} The mortgage instrument contained the following provision as part of a rider:

"The mortgage of the FCC license of Radio Station KDAN is made pursuant to a plan of installment payments represented by the note which this mortgage secures, which said plan has been approved by order of the FCC. Mortgagor irrevocably appoints Mortgagee as Mortgagor's attorney in fact for the purpose of applying to the FCC for transfer of said license to Mortgagee in the event of default by Mortgagor under this mortgage or the note which the same secures and the exercise of any of Mortgagee's rights hereunder by Mortgagee upon such default." A. 53.

Subsequently, Radio KDAN, Inc. fell into default, leaving an unpaid balance due of approximately \$50,000. In February and March, 1966, Hansen acted to foreclose the mortgage. Meeting the requirements of California law, the property involved was offered for sale at a public auction. Hansen was the successful bidder at the auction, at a price of \$85,000 (representing the principal owing plus interest and attorney's fees), and was

^{1/} The land occupied by the station was then under a lease which contained an option for purchase by the lessee. In the sale of the station, it was contemplated that Radio KDAN, Inc. would take an assignment of the lease and, thereafter, would exercise the option to purchase the land. Accordingly, the mortgage covered both the real and personal property of the station. A.53.

granted title to all the real and personal property involved in the operation of the station, including the land, building, and technical equipment. Nevertheless, Radio KDAN, Inc. deprived Hansen of possession of the property, so he was obliged to file suits for possession. A. 14-15. Radio KDAN, Inc. resisted these suits. A judgment in favor of Hansen for possession of the personalty was rendered on June 17, 1966 (on a motion for summary judgment), and a judgment in favor of Hansen for possession of the real estate was handed down on May 2, 1967 (after a trial held on March 24, 1967). Fifteen days later, on May 17, 1967, Hansen filed an application for the Commission's consent to an assignment of the license for the station to himself.^{2/} Radio KDAN, Inc. had declined to sign the assignor's portion of the application, and the filing was thus limited to the portion to be completed by the proposed assignee.^{3/} Shortly thereafter, Hansen remembered the mortgage provision quoted above and, acting pursuant to it, executed an assignor's portion of the application as attorney-in-fact for Radio KDAN, Inc., and filed it with the Commission on July 20, 1967. A. 18.

Meanwhile, on April 11, 1967, Radio KDAN, Inc. entered into an agreement with one Phil Jackson for a sale of the license for station KDAN for a consideration of \$24,500. On April 19, 1967, an application for the Commission's consent to this assignment was filed. A. 15. On June 23, 1967, Hansen filed with the

^{2/} Hansen also requested authority to restore the station to regular operation on an interim basis.

^{3/} On June 12, 1967, Hansen filed, as an amendment of the application, copies of the judgments for possession of the property of the station.

Commission a petition for denial of this application. A. 3. Radio KDAN, Inc. filed an opposition pleading, and Hansen followed with a reply. A. 6, 10. On February 29, 1968, the Commission released the aforementioned memorandum opinion and order dismissing the Hackson assignment application, dismissing Hansen's petition as moot, and cancelling the license for KDAN. A. 13. In a footnote, the Commission dealt with Hansen's assignment application, declaring "void ab initio" the mortgage provision under which Hansen executed the assignor's portion of the application, then holding the entire application moot in view of its action cancelling the license for the station. A. 14.

SUMMARY OF ARGUMENT

An application for the Commission's consent to an assignment of the license for a station is incomplete unless it is composed of the portions required of both the assignor and the assignee.

When a station is sold on deferred payment terms and the assets are mortgaged to secure payment, then the buyer defaults and the seller forecloses, the foreclosure sale is ineffective unless there is some form of assurance that the buyer will sign the assignor's portion of an application for assignment of the license to the successful bidder, whether that bidder is the original seller or someone else. Here, the assurance was given in the form of a contract provision by which the buyer

agreed that, on default and foreclosure, the seller might act as his attorney-in-fact for the purpose of signing an assignor's portion of an application for assignment of the license to the seller, on the assumption that the seller would be the successful bidder at the foreclosure sale. Such a provision is not void as a violation of the Commission's rule against the retention by an assignor of a right to a reversion of an assigned license.

The Commission holds that a licensee must be free to choose from the whole field of possible successors to his license, and not be limited to his assignor, but that is a useless freedom when, in the default and foreclosure situation, the assets of the station are sold out from under the licensee, and he is left with a bare license which the Commission will not permit him to assign for a consideration. The Commission may not assert the necessity to preserve such a freedom as a basis for voiding reasonable security provisions for default situations.

The Commission's action in this case is inconsistent with its actions in other cases, for it has previously approved contract provisions protecting sellers against defaults by mortgages of licenses, pledges of the stock of licensees, commitments by buyers to sign applications for assignment of the license to the successful bidder at a foreclosure sale (including the seller or his nominee), and provisions for

direct reverters of the license, or control of the licensee.

The Commission was without power to dismiss the Hansen assignment application without affording him a hearing on the questions of law and policy involved in determining whether his mortgage provision constituted a violation of its rule against reversions. The holding that his application was defective, as a violation of the rule, is not sustainable where neither the rule itself nor the published decisions interpreting it gave Hansen fair reason to believe that his mortgage provision would be considered a patent violation of the rule.

The Commission believed that, in cancelling the license for KDAN and dismissing the Hansen assignment application, it was making the frequency available for use by anyone who might apply for it. To the contrary, under the Commission's own technical standards, the frequency is not available for an application for a new station in or near Eureka.

ARGUMENT

Background Matters

Broadcasting stations are bought and sold under the supervision of the Commission. The supervision is exercised by virtue of the statutory directive that the license for a station, once issued by the Commission, may not be disposed of until the Commission has received and granted an applica-

tion for its consent.^{4/} The form of application which is used reflects the nature of the transaction. Thus, where the transaction involves a sale of the assets of the station, the application is for the Commission's consent to an accompanying assignment of the license; and where the transaction involves a sale of the stock of the corporation holding the license, the application is for the Commission's consent to a transfer of control of the licensee corporation.

The Commission's form of application for its consent to an assignment of license (Form 314) is composed of two parts, one to be completed and signed by the assignor, and one for the assignee. The form of application covering a transfer of control (Form 315) is composed of three parts, one for the transferor, one for the licensee corporation, and one for the transferee.

An additional restriction on assignments and transfers is imposed by a Commission rule which provides, in pertinent part:

"No...assignment of license, or transfer of control of a corporate licensee shall be granted or authorized to a standard broadcast station which has a contract, arrangement or understanding, express or implied, pursuant to which, as consideration or partial consideration for the assignment of license or transfer of control, the assignor of a station license or the transferor of stock...or the nominee of such assignor or transferor retains any right of reversion of

^{4/} Communications Act of 1934, as amended, Section 310(b); U.S.C., Title 47, Section 310(b).

the license or any right to the reassignment of the license in the future..."5/

I. THE THEORY UNDER WHICH THE COMMISSION APPLIED ITS RULE TO THIS CASE IS NOT SUPPORTABLE IN THE DEFAULT SITUATION

The rule prohibiting a right of reversion has been applied by the Commission to serve a useful purpose, and a significant public interest, when it has been used to bar leases of station facilities where the lessee receives possession of the facilities of the station and an assignment of the license for a fixed term, and thus becomes obliged not only to return the facilities but also to reassign the license at the end of the term. Alabama Polytechnic Institute, 7 FCC 225 (1939), Associated Broadcasters, Inc., 6 FCC 387 (1938), Broadcast Station WMAL, 5 FCC 364 (1938). The theory supporting these decisions was expressed most fully in the Alabama case as follows:

"In the usual case, by the device of such lease arrangements as this, persons or corporations holding broadcast station licenses are in a position to establish themselves indefinitely in control of a particular radio station, that is, they are able to put themselves in the same position at the expiration of the lease as though they had continued to operate the station during the lease period...To permit this practice to continue would be to create a situation in which those persons now licensed to operate radio stations would be able to exercise a practical domination and control over the broadcast facilities in this country...holders of existing licenses need never relinquish their

5/ 47 C.F.R. 73.139. The Commission has identical rules regarding sales of FM stations (47 C.F.R. 73.241) and television stations (47 C.F.R. 73.659).

stations permanently, but are in a position to farm them out over a period of years, then return to their status as licensees, then perhaps again step aside for another period of years, again to revert to their original status. This, we believe, will be subversive of the general public interest." 7 FCC at 228-230.

This appellant has no quarrel with the theory thus expressed. However, in a later case, one also involving a lease, the Commission expressed a different theory which it has now applied to the case at hand. The case was Yankee Network, Inc., 5 RR 216, 13 FCC 1014 (1949), and the Commission there said:

"We have...disapproved of leases which contained a right of reverter to the lessor (In re Broadcast Station WMAL, 5 FCC 364) or where at some future date the assignee was obligated to apply for a return of the license to the assignor (Alabama Polytechnic Institute (WAPI), 7 FCC 225). The necessity for prescribing such provisions flows from the theory that a licensee, who has by assignment parted with the privileges and obligations inherent in the license, should not be allowed to reserve any rights in them. Likewise, the assignee must have complete freedom to operate the station in the public interest, a freedom which inevitably carries with it the duty of independent decision. If such assignee subsequently chooses to dispose of his license, the public interest requires that a choice be made from the whole field of possible successors, and not be limited to the party from whom the facilities were obtained in the first instance." 5 RR at 223-224.

Citing the Yankee Network case as the sole authority,^{6/} the Commission held that the mortgage rider involved here is void, and stated its reasons as follows:

"The Commission has consistently held that a broadcast license (as distinguished from a station's plant or physical assets) may not be hypothecated by way of mortgage, lien, pledge, lease, etc. This principal, deriving ultimately

^{6/} There appears to be no other published case in which the theory is expressed.

from Section 301 of the Communications Act, is firmly rooted in Commission practice, its rationale being that such a hypothecation endangers the independence of the licensee who is and who should be at all times responsible for and accountable to the Commission in the exercise of the broadcasting trust....Our policy is that a transferee or assignee (buyer) must be free to dispose of the control of the corporation or the station license without the consent of the seller, or former owners." A. 27-28.

Unlike the Yankee Network case and its precedents, this case does not involve a lease, and there are two cogent reasons why the Commission's stated theory cannot rationally be applied to contract provisions which serve to give the seller of a station reasonable security against a default by the buyer on a deferred payment obligation.

A. Broadcasting stations, like other businesses, are often sold on terms providing for deferred installment payments, evidenced by one or more promissory notes, which notes are in turn secured by a mortgage on the assets sold or by a pledge of corporate stock.^{7/} The stock pledge involves either the very

^{7/} It is common to our law that a seller of property may, by his contract with the buyer, protect himself against the buyer's default by the only practical means available, i.e., by reserving the right or power to regain the property, or the proceeds from a sale of the property. The Uniform Commercial Code, which by November 1, 1967, had been adopted by 49 states, the District of Columbia, and the Virgin Islands, provides that when a debtor is in default under a security agreement (including a pledge, assignment, mortgage, trust, or conditional sale), the secured party is entitled to take possession of the collateral. If the debtor has paid less than sixty percent of the total due, the secured party may retain the collateral in satisfaction of the obligation, provided the debtor has not objected after receiving notice. If the debtor has paid sixty percent or more, the secured party is required to sell the collateral. The disposition may be made at a public or private sale, and the secured party is entitled to be the purchaser, subject to specified conditions if the sale is private. Sections 9-501, 9-503, 9-504, 9-505.

stock which is being sold (in the transfer of control situation), or the stock of the assignee corporation (in the case where the assets and the license are being assigned to a corporation). The parties also usually contemplate, by their agreement or by relying on local law, or both, that in the event of a default by the buyer the mortgaged assets or the pledged stock are to be sold at public auction, with the seller having the right to buy in. The Commission has never considered such security provisions to be objectionable, and has regularly entertained and granted applications with contracts having such terms. A. 30ff. Now, these considerations must be weighed in connection with another Commission policy - one which it has enforced firmly and which, indeed, it applied to the Jackson assignment application in this case. The policy is that a license standing alone, what the Commission refers to as a "bare" license, may not be sold for a consideration. A. 15-16. The question thus raised is: when the Commission permits contract provisions under which the assets of a station can be sold out from under a licensee, in which case he is left with nothing but a bare license which he may not assign to anyone for a consideration, or provisions under which the stock of a licensee corporation can be sold out from under the stockholders, in which case they are powerless to transfer control of the licensee corporation to someone else, what becomes of the freedom of the licensee to choose from the "whole field of possible successors" to his license. The answer, of course, is that it becomes a useless and hollow freedom, and there is no public interest to be served by a policy calculated to foster a freedom which has

no substance. It follows that when the Commission uses the necessity to preserve such a freedom as a ground for voiding contracts which provide for reasonable security provisions of the sort involved here, it acts arbitrarily and capriciously.

B. Beginning, again, with the point that the Commission has never objected to contract provisions under which, in the event of default by the buyer, the assets of the station or the stock of the licensee may be sold at public auction, and the seller may buy in, we find another reason why the theory which the Commission applied to this case is insupportable. Normally, the public sale is held at the behest of the seller, for he is engaged in foreclosing on the security, and he is usually responsible for assuring that the assets are available for delivery to the successful bidder. However, the sale becomes a frivolous exercise unless the buyer is under some sort of obligation or compulsion to prepare and sign the assignor's or transferor's portion of an application for the Commission's consent to an assignment or transfer of the license to the successful bidder at the sale, whether it is the seller or someone else. It is common knowledge that the tangible assets of a station, or the shares of stock representing those assets, constitute only a fraction of the price at which a station can be sold, and it follows that the successful bidder at the auction buys little if he does not also acquire an opportunity to present to the Commission a complete application for the license. Whether he is the original seller or a new purchaser, he takes the risk that the application may be denied, but that is a risk

which he must take, for the law imposes it, but when a Commission ruling imposes the additional risk that the application he presents will have to be rejected as incomplete because the buyer refused to sign the portion which must be executed by an assignor or transferor, it is patently unreasonable, and involves no public interest which requires protection.

There are only a limited number of ways in which the seller of a station can obtain reasonable assurance that the buyer will execute an application for an assignment or transfer of the license in the event of his default. The purchase and sales contract might contain a provision obliging him to do so, or might contain an appointment by the buyer of some other person, even the seller, to execute the application in his name. Such provisions are reasonable and necessary as security for the payment of deferred purchase money obligations, and are not voidable as creating a right of reversion in violation of the Commission's rule.

In the case at hand, the mortgage rider provided for the appointment of Hansen as the attorney-in-fact for Radio KDAN, Inc. for the sole purpose of applying to the Commission for a transfer of the license in the event that Radio KDAN, Inc. defaulted and Hansen exercised his right to foreclose and to buy in. The fact that the rider provided for a transfer of the license to Hansen, rather than to whoever might be the successful bidder at a public sale, is clearly a matter of inartful draftsmanship. The parties knew that, under California

law, the mortgage could be foreclosed only through the medium of a public sale, and it was not unreasonable for Hansen to anticipate that he would be the successful bidder, perhaps even the only bidder. The seller is normally in the best position to bid and to purchase at a foreclosure sale, for, in effect, he pays himself that portion of the bid price which represents the arrears due to him, while any other bidder must pay the entire price, and in cash. Also, the seller is often compelled to bid in order to prevent a sale at a price substantially less than what is owed to him. For these reasons, sellers are most often the successful bidders, and frequently the only bidders, at foreclosure sales.

Hansen foreclosed at a time when he was owed a balance of some \$50,000 plus interest. A sale of the assets of the station would have brought him only a small fraction of that sum. His only hope of being made whole was to regain ownership of the assets, by buying in at the foreclosure sale, and then to secure the license so that he might restore the station to regular operation in the public interest. To become the successful bidder, he had to bid \$85,000 to cover interest and attorneys fees as well as the principal due. He then had to commit more time and expense to sue for possession of the property when the buyer wrongfully denied him possession. Promptly thereafter, he applied to the Commission for the license. The Commission refused even to consider his application, and solely because Hansen had sought to protect himself against the very eventuality which occurred - the refusal of a defaulting buyer to sign the application necessary to propose an assignment of

the license. Thus, Hansen became the lawful successor to all the assets of the station, but was summarily barred from receiving an assignment of the license. No public interest consideration compels so drastic a result.

II. THE COMMISSION'S ACTION HERE IS INCONSISTENT WITH PREVIOUS ACTIONS

Within the limits of the time available for the preparation of appellant's brief, it was possible to examine some 155 Commission files containing assignment and transfer applications granted within the past ten years. This represented only a sampling of the total number of such files, but the sample was selected at random.

In a number of instances the contracts involved in the granted applications were not relevant because they provided for transactions in cash, and thus contained no security provisions, and in other instances the contracts were not helpful because their security provisions were limited to the requirement that security instruments satisfactory to the seller would be delivered at the closing. These represented approximately one half of the sample. Out of the remainder, appellant has excerpted 36 contract provisions which the Commission approved, and appellant's purpose here is to show that the Commission's action dismissing the Hansen application was not consistent with these previous actions.

The Commission dismissed the Hansen assignment application in part because the mortgage rider contained the "vital defect"

that it purported to mortgage the KDAN license, and the Commission later referred to the "extraordinary language concerning the 'mortgaging' of the license itself." A. 27, 29. The Commission claims that it,

"...has consistently held that a broadcast license ...may not be hypothecated by way of mortgage, lien, pledge, lease, etc."

Nevertheless, in two instances found in the sample the Commission approved contracts which expressly provided for mortgages of the licenses involved. A. 51, 52, items (35) and (36). What may be even more significant is that the Commission appears to have acted consistently, and without exception, in approving contracts which provided for pledges of the capital stock of licensee corporations, sometimes the stock which was the subject of the transaction transferring control of a licensee corporation, and sometimes the stock of a corporation taking the license and the assets by assignment. A. 31-39, items (1) to (16). If, for the purpose involved here, pledging the stock of a licensee corporation is acceptable, then mortgaging the license may not be considered objectionable, for it is no different. The independence of the licensee is no more affected by a hypothecation of its license than by a hypothecation of its corporate stock. It follows that the Commission acted arbitrarily in dismissing the Hansen assignment application because of a purported mortgaging of the license for KDAN.

The principal ground for the Commission action here was the holding that the mortgage rider reserved to Hansen a reversionary interest in the license for KDAN. The Commission said:

"In interpreting its prohibition on reversions contained in Sections 73.139 (for AM), 73.241 (for FM) and 73.659 (for TV), the Commission has consistently refused to grant applications for the transfer of control of a corporate licensee or for an assignment of a station license where a former owner or licensee has retained by contract or understanding, oral or written, a right or a power to regain the status of licensee through a reversion of stock control or the reassignment of the station license in the event of default by the purchaser, or upon the happening of some other contingency." A. 28.

In three instances found in the sample, the Commission granted applications where the contract provided for a direct reverter on default. One required the buyer to reassign the license to the seller (A. 49, item (32)), another required the return to the sellers of the pledged stock of the licensee corporation (A. 50, item (33)), and another required assignment of the license to the seller's nominee (A. 50-51, item (34)). The opportunity for reassignment which Hansen obtained by his mortgage is far removed from the certain and automatic reverters provided there. In three more cases (where the identical contract provision was used in all three contracts), it was required that, on default and foreclosure, the buyer reassign the license either to the seller or to the successful bidder at a foreclosure sale. A. 43-44, 46-47, items (22), (26), (27). These were, of course, closer to the thrust of the Hansen mortgage provision.

In many more instances, the Commission approved contracts providing that, following a foreclosure sale, the buyer was required to cooperate in the preparation and execution of an application for assignment of the license or transfer of control

of the licensee to the successful bidder at the sale. A. 39-49, items (17) to (31). Indeed, in one of these cases, the default actually occurred, the pledged stock was sold at public auction, the seller was the successful bidder, and the Commission granted applications pursuant to which the seller was permitted to re-take control of the license — and for the sole purpose of effecting a simultaneous assignment of the license and the assets to a third party in order to recoup its losses. A. 40-42, item (19). Thus, the Commission not only condoned the provisions by which the seller became entitled to regain control of the license, but thereafter approved an actual reversion of control to him.

The "freedom" which the Commission claims to be preserving in licensees was also patently restricted in two contracts which provided that, during the period of the deferred indebtedness, the buyer could not assign the license to any other person without the consent of the seller. A. 41, 42, items (19), (20).

Finally, there was one instance in which the contract provisions came very close to what was provided in the Hansen mortgage. The buyer, by the contract, appointed the attorney for the seller as his own "true and lawful" attorney for the purpose of performing all the acts necessary to constitute an "effective" transfer of control of the pledged stock to the seller in the event of default. While it was not provided expressly, the agreement plainly contemplated that the attorney would execute a transfer of control application in the name of the buyer and for the benefit of the seller. A. 44, item (23).

In the face of these actions, the Commission may not be heard to say that it was obliged to dismiss the Hansen assignment application in order to enforce its policy that the buyer of a station must be free to choose his successor licensee from the whole field and not be obligated to apply for assignment or transfer to the seller or his nominee. This is especially so when it is expected or provided that the seller may bid at the foreclosure sale, and when it is known that such sellers are usually the successful bidders and often the only bidders.

III. THE COMMISSION ERRED IN DISMISSING THE HANSEN ASSIGNMENT APPLICATION WITHOUT A HEARING

Section 310(b) of the Communications Act provides that an application for the Commission's consent to an assignment of a license, or a transfer of control of a licensee corporation,

"...shall be disposed of as if the proposed transferee or assignee were making application under Section 308 for the...license in question..."

Section 309(a) of the Act provides that, in the case of each application to which Section 308 applies, the Commission shall determine,

"...whether the public interest, convenience and necessity will be served by the granting of such application..."

Finally, Section 309(e) provides that,

"If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for an reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining ..."

In his petition for reconsideration, Hansen argued to the Commission that his application could not be dismissed without a hearing. A. 19. The Commission disposed of this argument with the holding:

"We find no merit in this contention: in our view, no undetermined question of fact remains." A. 29.

This is not enough, as this Court has had more than one occasion to hold. Under Section 309(e), the Commission is required to order a hearing where there is a substantial and material question of fact or the Commission "for any reason" is unable to find that a grant will serve the public interest, convenience and necessity. Thus, the absence of factual issues is not enough to sustain summary action where significant questions of law or policy are involved. Radio Athens, Inc. v. FCC, No. 21,476, decided July 9, 1968, ___ F.2d ___, ___ U.S. App. D.C. ___; Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1006-1009, 123 U.S. App. D.C. 3281 (1966); Louisiana Television Broadcasting Corporation v. FCC, 347 F.2d 808, 809-811, 121 U.S. App. D.C. 24 (1965).

Hansen acknowledges that the Commission is empowered to reject an application which is patently in violation of its rules or policies (See Radio Athens, Inc. v. FCC, supra), but Hansen also relies on the doctrine of the Radio Athens case that the rule involved, or the rule coupled with Commission interpretations in published decisions, must "fairly advise a reasonable applicant" that some problem in his application will constitute a patent violation. The rule which the Commission

invoked to dismiss the Hansen assignment application interdicts against contract provisions under which an assignor or transferor retains, for himself or his nominee, "any right of reversion of the license or any right to the reassignment of the license in the future." This language could not serve to advise Hansen and Radio KDAN, Inc. that the mortgage provision which they drew would, as a matter of law, constitute a patent violation of the rule. Nor are there published decisions which would convey that knowledge. The four cases which have already been cited, Yankee Network, Inc., Alabama Polytechnic Institute, Associated Broadcasters, Inc., and Broadcast Station WMAL, supra, P. 8, all involved leases, for fixed terms, and with provisions for reverter of the license at the end of the term. The only other published ruling involving a reverter is in a case decided in this Court, Churchill Tabernacle v. FCC, 160 F.2d 244, 81 U.S. App. D.C. 411 (1947). There, the Court concurred in the Commission's objection to a contract which provided for the sale of a station, then granted the seller an exclusive right to the use of certain broadcast periods, provided for weekly payments to the buyer for the broadcast time, and went on to provide that (a) the buyer could not assign, transfer or dispose of the license without the written consent of the seller, and that (b) in the event the buyer failed to provide the broadcast time as agreed, all the right, title and interest in the property, including the operating license, would, on written notice, revert to the seller.

It is thus seen that none of the few reported cases gave fair notice that an agreement which involved deferred installments of part of the purchase price, promissory notes, a purchase money mortgage, and the appointment of the mortgagee as attorney-in-fact for the mortgagor for the purpose of executing an application for transfer of the license to the mortgagee in the event of default and foreclosure, would be regarded by the Commission as patently in violation of its rule, and would result in the summary dismissal of an application. Accordingly, following its holding in the Radio Athens case, the Court is urged to hold that Hansen was entitled to a hearing on his assignment application.

IV. THE COMMISSION ERRED IN STATING
THAT ITS ACTION SERVED TO MAKE
THE FREQUENCY AVAILABLE FOR USE
IN EUREKA

When the Commission acted to declare the license for station KDAN forfeit, it stated that it was thus making the frequency (790 kc) available for use by someone else in Eureka or in some other community. A. 16, 25. Following the denial of his petition for reconsideration, Hansen entertained the idea of filing an application for a construction permit for a new station at Eureka, using the frequency and other facilities which had been licensed for KDAN. He engaged a consulting engineer to consider the matter, and was subsequently informed that, under the new technical rules adopted by the Commission in 1962,^{8/} no application for a new station using 790 kc in or

^{8/} Clear Channel Report (Further Supplement), 21 RR 1843.

around Eureka could be accepted for filing. He was also informed that no other frequency is available for that purpose.

It is apparent that the Commission did not consider the effect of its technical rules when it acted to dispose of this matter, notwithstanding that it was fully with the Commission's capacity to ascertain whether or not the frequency would be available for use. The result of this failure is clear. By refusing to entertain the application for its consent to an assignment of the license for KDAN to Hansen, the Commission insured that the Eureka community would be forever barred from enjoying the services of KDAN or any other station which might replace it. This is a consequence which the Commission was obliged to weigh, with judicious concern for its impact, before indulging in the summary action dismissing the Hansen application.

CONCLUSION

The Court is requested to rule that the Commission erred in invoking its rule against reversions as a basis for dismissal of Hansen's application, or, in the alternative, to rule that the Commission erred in dismissing the Hansen application without a hearing, and, upon either ruling, to remand the matter to the Commission for disposition not inconsistent therewith.

ADDENDUM

STATUTES AND REGULATIONS INVOLVED

Communications Act of 1934, as amended:

Sec. 309. (a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application. U.S.C., Title 47, Section 309(a).

Sec. 309. (e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor... U.S.C., Title 47, Section 309(e).

Sec. 310. (b) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under Section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee. U.S.C., Title 47, Section 310(b).

Rules and Regulations of the Federal Communications Commission:

Section 73.139. Special rules relating to contracts for reservation of time upon sale of station.

No license, renewal of license, assignment of license, or transfer of control of a corporate license shall be granted or authorized to a standard broadcast station which has a contract, arrangement or understanding, express or implied, pursuant to which, as consideration or partial consideration for the assignment of license or transfer of control, the assignor of a station license or the transferor of stock, where transfer of a corporate licensee is involved, or the nominee of such assignor or transferor retains any right of reversion of the license or any right to the reassignment of the license in the future, or reserves the right to use the facilities of the station for any period whatsoever.

47 C.F.R. 73.139.

BRIEF FOR APPELLED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,013

W. H. HANSEN,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

ON APPEAL FROM DECISIONS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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FILED OCT 3 1963

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant, W. H. Hansen, appeals from a decision of the Federal Communications Commission which found his application for the assignment of license of standard broadcast station KDAN, Eureka, California, to be moot because of the Commission's action in the same opinion declaring such license forfeit (A. 13-17).^{1/}

^{1/} In addition to cancelling the KDAN license and noting that Hanson's assignment application was therefore moot, the Commission dismissed another assignment application filed by the station licensee, Radio KDAN, Inc. It also found Hansen's Petition to Deny this latter assignment moot. Neither Radio KDAN nor Phil Jackson, its proposed assignee, sought reconsideration, and they are not parties to this appeal.

Hansen, while not directly challenging the Commission's finding that his assignment application was moot, sought reconsideration, essentially attacking dicta in the Commission's decision with regard to such assignment application (A. 17-23). The Commission denied reconsideration (A. 24-29) and this appeal followed.

Appellant Hansen was formerly the licensee of radio station KDAN, Eureka, California. In 1959, he assigned his license to Radio KDAN, Inc., taking back a purchase money mortgage as part of the consideration for the sale (A. 14). In 1961, KDAN defaulted on the mortgage and Hansen began foreclosure proceedings. KDAN instituted voluntary bankruptcy proceedings in 1963, but before a discharge could be obtained, Hansen foreclosed. At the foreclosure sale in February 1966,^{2/} he purchased the real and personal property of KDAN. The station ceased broadcasting on July 10, 1966, and Hansen obtained possession on July 25, 1966 (A. 14-16).

^{2/} Hansen had sold the station in 1959 for \$225,000. When Radio KDAN defaulted in 1961, \$50,000 was still owed Hansen (A. 14).

After the station had, without Commission approval, remained silent for ten months, KDAN filed an application to assign its license to one Phil Jackson. Since KDAN no longer had possession of the property, Jackson proposed to build a new station which would be operable in six months (A. 15).

Shortly thereafter, on May 17, 1967, Hansen, the mortgagee and former owner who now possessed the station's property, tendered for filing to the Commission an assignment application for KDAN. Since the section of the application which must be executed by the assignor was missing, the application was never formally accepted. On July 20, 1967, Hansen attempted to remedy this omission by submitting the assignor's part of the application executed by himself (A. 14). In completing both the assignor's and assignee's portions of the assignment application, Hansen relied on a "rider" which had been added to the mortgage Hansen took from Radio KDAN in 1959 subsequent to the Commission's approval of the assignment. The "rider" which was not filed with the Commission until July 1967, eight years after the Commission had approved the assignment, provides as follows:

The mortgage of the FCC license of Radio Station KDAN is made pursuant to a plan of installment payments represented by the note which this mortgage secures, which said plan has been approved by order of the FCC. Mortgagor irrevocably appoints Mortgagee as Mortgagor's attorney in fact for the purpose of applying to the FCC for transfer of said license to Mortgagee in the event of default by Mortgagor under this mortgage or the note which the same secures and the exercise of any of Mortgagee's rights hereunder by Mortgagee upon such default. (A. 18).

On June 23, 1967, Hansen also filed a Petition to Deny the KDAN-Jackson assignment application (A. 3-6).

The Commission considered both assignment applications and Hansen's Petition to Deny in a decision released February 29, 1968 (A. 13-17). In disposing of the assignment application filed by Radio KDAN and Jackson, the Commission found that it "contemplate[d] little more than the sale of the naked license" and that "Commission policy bars such a sale" (A. 15). The Commission then on its own motion dismissed the KDAN-Jackson assignment application as well as Hansen's Petition to Deny which had thus been rendered moot (A. 16).

Moreover, in regard to the KDAN license, the Commission concluded that:

Since the licensee has informed the Commission that he is unable to resume broadcasting, since there is in fact no site and no antenna available with which the licensee could broadcast, and since for many months the station's silence has been without the Commission's authorization, it is our view that the KDAN license must now be declared forfeit, thus making the frequency available for use by others in Eureka or some other appropriate community. (A. 16).

Referring to Hansen's assignment application, the Commission noted that "declaring forfeit the KDAN license, renders it moot" (A. 14). The Commission also considered the mortgage "rider" relied upon by Hansen as authority for his having completed both

sections of the assignment application. The Commission observed:

In our view, such a clause is void ab initio since it attempts to retain for Hansen a reversionary interest in the KDAN license, and as such is expressly forbidden by Section 73.139 of our rules. The extraordinary notion that a station license issued by this Commission is a mortgageable chattel in the ordinary commercial sense is untenable. Furthermore, the alleged mortgage agreement of 1959 was brought to the Commission's attention for the first time in July 1967, and had never been previously filed with the Commission, as required by our rules. 3/ (A. 14).

Hansen, in seeking reconsideration of the Commission's decision, asked first to have the forfeiture of KDAN's license held in abeyance and then argued that the Commission was without authority to refuse to accept his assignment application in light of the mortgage rider which gave him the power to act as the licensee's "attorney in fact" (A. 17-23). The Commission noted that if the

3/ Section 73.139, 47 CFR 73.139, provides:

No license, renewal of license, assignment of license, or transfer of control of a corporate licensee shall be granted or authorized to a standard broadcast station which has a contract, arrangement or understanding, express or implied, pursuant to which, as consideration or partial consideration for the assignment of license or transfer of control, the assignor of a station license or the transferor of stock, where transfer of a corporate licensee is involved, or the nominee of such assignor or transferor retains any right of reversion of the license or any right to the reassignment of the license in the future, or reserves the right to use the facilities of the station for any period whatsoever.

rider had been submitted to the Commission as required by the rules at the time of its origin, it would have been rejected because of two "vital defects": "(1) it purported to mortgage the KDAN license; and, (2) it reserved to Hansen a reversionary interest in the KDAN license, which license had passed from Hansen to . . . Radio KDAN, Inc. . . . pursuant to a Commission grant" (A. 27-28). The Commission held that such a rider "cannot now be used as a vehicle to effect the reassignment of the KDAN license to Hansen" (A. 29). Hansen's petition for reconsideration was denied and this appeal followed.

ARGUMENT

IN LIGHT OF THE COMMISSION'S FINDING THAT HANSEN'S APPLICATION FOR ASSIGNMENT OF KDAN'S LICENSE TO HIMSELF WAS RENDERED MOOT BY THE CANCELLATION OF THAT STATION'S LICENSE, THE ISSUES PRESENTED BY THIS APPEAL, DEALING SOLELY WITH THE VALIDITY OF SUCH ASSIGNMENT APPLICATION, ARE LARGELY ACADEMIC.

As a threshold matter, we stress that in his brief on appeal, appellant Hansen appears neither to challenge the validity of the Commission's action declaring the KDAN license forfeit nor the validity of its action dismissing as moot Hansen's application to assign such forfeited license.^{4/} Hansen's brief focuses chiefly on legal and policy questions concerning his ability to have filed this assignment application pursuant to the provisions of a mortgage agreement, and whether a hearing should have been held to resolve such questions. But, these matters have no substantial bearing on the validity of the Commission's basic action here--the cancellation of the KDAN license. Accordingly, Hansen's appeal raises no matters which could conceivably serve as a basis for setting aside the Commission's action. Therefore, the Commission's orders must be affirmed. Cf. Brown Telecasters, Inc. v. F.C.C., 110 U.S. App. D.C. 127, 289 F.2d 868 (1961); Market Street Railway Co. v. Comm'n, 324 U.S. 548, 561-562 (1945). Should the Court wish to consider the matters raised by appellant,

^{4/} This Court has recognized the propriety of the Commission's policy that the assignment of a broadcast authorization will not be considered until the Commission has determined that the authorization has not been forfeited. Jefferson Radio Company v. F.C.C., 119 U.S. App. D.C. 256, 258, 340 F.2d 781 (1964).

however, we demonstrate below that these issues are without merit and that the Commission's decision should be affirmed.

Appellant asserts as follows: (a) the Commission acted unreasonably when it found that Hansen's mortgage agreement with KDAN violated the Commission's rule against retention by an assignor of a right to reversion of an assigned license; (b) that the Commission has in the past approved mortgage agreements like Hansen's; (c) that the Commission should have held a hearing on whether Hansen's assignment application was defective; and (d) that the Commission was incorrect in concluding that its action declaring the KDAN license forfeit would make the frequency available for use by others. We will consider these issues below.

A. The Commission's Rule Prohibiting Reverters Is A Reasonable Regulation And No Hearing Was Required In Connection With Its Application Of Such Rule Here.

1. The Rule Is Reasonable.

To restate briefly, appellant Hansen, the former licensee of radio station KDAN, Eureka, California, sought Commission approval of an assignment application for station KDAN in which he had executed both the assignor's and assignee's sections of the application. As a legal basis for this extraordinary action, he relied on a rider to a purchase money mortgage agreement he had entered into with Radio KDAN, Inc., when he had sold the

station to that corporation in 1959. The rider authorized him to act as KDAN's "attorney in fact" in a license assignment application to the Commission should KDAN default on its mortgage agreement. Six years after KDAN defaulted, and two months after Hansen had submitted an assignment application with only the assignee's section completed, KDAN having refused to sign the assignor's section, Hansen "remembered" this default rider and submitted the assignor's section of the assignment application executed by him..

The Commission noted that the rider was not a part of the 1959 assignment package but was brought to the Commission's attention more than eight years after its execution in contravention of the Commission's rules.^{5/} Had it been presented to the Commission in 1959, the Commission stated that it would have been rejected out of hand since under the rider, once the mortgagor defaults, he "loses control of the license and can say nothing more concerning its assignment" (A. 29). Thus, the Commission concluded that the mortgage rider could not be used as a vehicle to effect the

^{5/} Section 1.540, 47 CFR 1.540, requires applicants requesting an assignment to complete FCC Form 314 which in turn provides at page 2 of Section I (Pike & Fischer RR Current Service, Forms 98:314-2), that the agreement or contract to transfer the property and facilities of the station be attached and that this includes "trusts, leases, debentures, and any other instruments which affect or concern the assignment...." This obligation is also clearly spelled out in Section 1.613 of the Rules of the Commission, 47 CFR 1.613.

reassignment of the KDAN license to Hansen. Hansen's chief attack on appeal (Br. 8-15) is directed against this conclusion.

It has long been the Commission's position that a broadcasting license, as distinguished from a station's physical assets, may not be hypothecated by way of mortgage, lien, pledge, etc. This principle derives ultimately from Section 301 of the Communications Act, 47 U.S.C. 301, which provides for the use of radio frequencies "but not the ownership thereof" by licensees for limited periods of time.^{6/} "The necessity for proscribing such provisions flows from the theory that a licensee, who has by assignment parted with the privileges and obligations inherent in the license, should not be allowed to reserve any rights in them. Likewise, the assignee must have complete freedom to operate the station in the public interest, a freedom which inevitably carries with it the duty of independent decision." The Yankee Radio Network, Inc., et al., 13 FCC 1014, 1020 (1949). In the latter case, the Commission stated additionally that if such assignee subsequently chooses to dispose of his license, he should not be limited in his choice of possible successors to the party from whom the facilities were obtained in the first instance.

^{6/} See also Section 309(h), 47 U.S.C. 309(h), of the Act which states in pertinent part: "(1) The station license shall not rest in the licensee any right in the use of the frequencies designated in the license beyond the term. . . ."

Moreover, the Commission's prohibition against reversions has long been contained in Section 73.139 of the Rules, a rule which has consistently been interpreted as was done in Yankee Network, to forbid the right or power to regain the status of licensee through a reversion in the event of default.

Hansen seeks to distinguish the Commission's holding in Yankee Network and the precedents therein cited, i.e. Alabama Polytechnic Institute (WAPI), 7 F.C.C. 225 (1939), and Broadcast Station WMAL, 5 F.C.C. 364 (1938), on the basis that these cases involved leases with reverters as distinguished from a mortgage with a reverter. He asserts that while such a policy may be correct when applied to leases, it is irrational when applied to security agreements such as mortgages between the buyer and seller of a radio station (Br. 10). Mortgages, he argues, always present the risk of default and foreclosure. The latter usually results in (1) the broadcast property being sold at a foreclosure sale and (2) the licensee being left with a bare license which he cannot sell. Thus, Hansen concludes, both the buyer at the foreclosure sale, who is usually the original seller, and the station licensee lose under the Commission's policy prohibiting reversion of the license in the event of default. The buyer has bought the station property whose value is diminished because he has no license, and the licensee, left with an

unassignable license, has lost the freedom to choose his successor licensee which the Commission, in such cases as Yankee Network, has found to be in the public interest.

The short answer to Hansen's argument is that the Commission's policy against reversionary clauses is, as we indicated above, dictated by the statutory mandate of Section 301 of Communications Act and is not subject to administrative balancing as Hansen would have the Commission do. As the Commission explained in its Order denying Hansen's petition for reconsideration, nothing can be permitted which "endangers the independence of the licensee who is and who should be at all times responsible for and accountable to the Commission in the exercise of the broadcasting trust" (A. 27). Certainly, there can be no doubt that the Commission properly found that Hansen's mortgage rider compromised this statutory mandate. Cf. F.C.C. v. Sanders Brothers Radio Station, 309 U.S. 470 (1940); Trinity Methodist Church, South v. Federal Radio Commission, 61 App. D.C. 311, 62 F.2d 850 (1932), cert. den. 288 U.S. 599 (1933); American Bond & Mortgage Company v. United States, 52 F.2d 318 (7th Cir., 1931).

Additionally, we note that whether the station's license is separated from the rest of the station's assets upon the licensee-mortgagor's default is clearly a matter within the control of the mortgagee who has the option to foreclose or not to foreclose.

Also, the purported dilemma which Hansen spells out is not, as he seems to indicate, an unusual situation or one in which all is lost to the mortgagee. Admittedly, the mortgagee who repossesses the station's physical assets cannot run the station. He does, however, have equipment which has a secondhand sale value, and he has land which can be sold or used for other purposes.

In what seems to be an afterthought argument, Hansen asserts (Br. 13-14) that the language of the rider which provided for a transfer of the license to Hansen upon default rather than, more broadly, "to whoever might be the successful bidder at a public sale" was clearly a matter of inartful draftsmanship. It is difficult to understand how such an intent could possibly be inferred from the clear language of this rider. Even assuming arguendo that such intent could be presumed, operation of the rider would still result in the licensee's abdicating his responsibility by allowing someone else to assign the station's license. And such action would still be a violation of the Commission's Rules and the Communications Act.

2. No Hearing Was Required.

In support of his petition seeking Commission reconsideration, Hansen had argued that questions of fact were presented which demanded the scrutiny of a hearing, i.e., whether the rider gave Hansen a right of reversion, and whether it was prohibited as such by Section 73.139 of the Rules. In answer, the Commission stated that it found "no merit in this contention; in our view, no undetermined question of fact remains" (A. 29). Hansen has now shifted his argument and contends for the first time (Br. 19-22) that, in any event, a hearing should have been held to determine whether he had fair notice by means of the Commission's rules as well as its reported cases that the mortgage clause in question would be regarded as in violation of the Commission's rules and would result in summary dismissal of his application. The answer to this contention is simply that had Hansen submitted the mortgage rider to the Commission at the time of its execution as required by the rules, it would have been rejected for the very reasons he now claims were not apparent to him.^{7/} The language of Section 73.139 is clear. It prohibits, "any right of reversion of the license or any right of reassignment of the

^{7/} Hansen has conceded that failure to report the mortgage rider to the Commission at the time it was executed is a violation of the rules (A. 22).

license in the future." To claim that such language is unclear stretches credulity to an extreme. Hansen has submitted no evidence which would demonstrate either that the rule was, in fact, unclear to him or that he was unaware that a licensee upon assignment of his license must sever all connections with the license. Cf. Radio Athens, Inc. v. F.C.C., __ U.S. App. D.C. __, __ F.2d __ (decided July 9, 1968).

B. Hansen's Arguments That The Commission's Action Here Is Inconsistent With Assignments It Has Approved In The Past And That It Will Prevent Future Service On 790 KC Were Never Presented To The Commission And Hence Should Not Now Be Considered.

As an additional attack on the Commission's finding that Hansen's mortgage rider was invalid because of its fatal reverter clause, Hansen has submitted as pages 32-52 of the Appendix of the parties thirty-six extracts from contracts which were submitted to the Commission in connection with various sales of broadcast facilities. These, he alleges, demonstrate that the Commission's action here is inconsistent with assignments it has approved in the past. These extracts were never called to the Commission's attention, and this argument was never made to the Commission.^{8/} Accordingly, it should not be considered by

^{8/} Additionally, we note that the inclusion of these extracts in the Appendix violates Rule 33(b) of the Federal Rules of Appellate Procedure in that they are not a part of the record on appeal. Also, the Commission never agreed to the inclusion of this material in the appendix.

this Court. 47 U.S.C. 405; Florida Gulfcoast Broadcasters v. F.C.C., 122 U.S. App. D.C. 250, 352 F.2d 726 (1965); United States v. Tucker Truck Lines, 344 U.S. 33, 37 (1952).

Failure to present this argument and the accompanying evidence to the Commission is particularly fatal in this instance. First, there is no record of the Commission's reasons for approving each of the contracts in question since no Commission opinion is ordinarily issued upon the approval of an assignment application. But even more important, many of the extracts submitted by Hansen to this court are unclear as to their full meaning due to the absence of either the full contract section in question or other apparently relevant parts which are not presented in the appendix. Thus, aside from the impropriety of presenting new arguments and material for the first time to a reviewing court, consideration of the material tendered by Hansen would not be fruitful because of the fact that it is presented in part only and totally out of context.

Additionally, there is no indication that Hansen in any way relied on the Commission's approval of past assignment and transfer applications either in connection with the formation or the ultimate use of the mortgage rider. Cf. F.C.C. v. WOKO, 329 U.S. 223, 227-228 (1946). Hansen merely states that a search was made of Commission files after the decisions that are being appealed from were rendered.

The Commission, in cancelling the KDAN license, noted that the forfeiture would make "the frequency available for use by others in Eureka or some other appropriate community" (A. 16). Hansen asserts (Br. 22-23) in yet another argument never presented to the Commission that the Commission's technical rules governing clear channel stations will bar future applications for a station in Eureka. Whatever the merits of Hansen's argument, his failure to raise this issue with the Commission forecloses its consideration on appeal. 47 U.S.C. 405.

In any event, he has submitted no evidence, even in his brief upon appeal, which would indicate that the clear channel rules bar future applications for operation on 790 kilocycles in the Eureka area. In fact, two applications seeking permits to construct on this frequency at Eureka have already been filed.^{9/} We also note that notwithstanding the demise of KDAN, Eureka, a city of 28,137 residents, still has two full-time standard broadcast facilities in operation.^{10/} Certainly, this clearly illustrates that the people of Eureka are not now nor will they be left without service.

^{9/} The Commission's files indicate that Phil D. Jackson (the unsuccessful proposed assignee from KDAN, Inc.) filed such an application on May 23, 1968, and that California Northwest Broadcasting tendered an application on June 4, 1968. No Commission action has been taken on these applications.

^{10/} KRED operates on 1480 kc and KINS operates on 930 kc in Eureka.

Finally, it should be noted that Hansen was the licensee of KDAN but voluntarily chose to assign his license because he found the climate in Eureka injurious to his family's health.^{11/} This entire appeal seems to be nothing more than an attempt by Hansen to regain KDAN's license in order to enhance the value of the broadcasting equipment he acquired as a result of KDAN's default under the purchase money mortgage. There is no indication at all that he desires to serve the residents of Eureka or that the public will be served in any way by returning this license to Hansen.

^{11/} See Exhibit 1, BAL-3435, dated April 15, 1959.

CONCLUSION

In sum, the Commission declared the KDAN license forfeit "since the licensee has informed the Commission that he is unable to resume broadcasting, since there is in fact no site and no antenna available with which the licensee could broadcast, and since for many months the station's silence has been without the Commission's authorization." This being so, it properly dismissed as moot the various applications pending before it seeking assignment of that license. Jefferson Radio Company v. F.C.C., 119 U. S. App. D.C. 256, 340 F.2d 781 (1964). None of the foregoing determinations has been challenged upon this appeal. Instead, appellant Hansen has focused on several peripheral issues which, even if he were correct, does not affect the validity of the Commission's decision based as it was upon perfectly valid reasons.

For the foregoing reasons, the Commission's orders here appealed from should be affirmed.

Respectfully submitted,

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Federal Communications Commission
Washington, D. C. 20554

October 3, 1968.

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,013

W. H. HANSEN,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

APPEAL FROM MEMORANDUM OPINION AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

FILED 31 1968

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I. THE RELIEF HANSEN SOUGHT FROM
THE COMMISSION IS ESTABLISHED
IN COMMISSION PRECEDENTS AND
HANSEN IS ENTITLED TO APPEAL
FROM THE DENIAL THEREOF

The Commission's principal argument is that the Hansen assignment application was properly dismissed because it had become mooted by virtue of the Commission's action declaring the license for station KDAN to be forfeited. This argument falls on several counts.

If it were true that in dismissing the Hansen assignment application the Commission had relied exclusively, or even predominantly, on the forfeiture of the license, and if it were clear that the Commission's rulings on the merits of Hansen's application amounted to nothing more than incidental dicta, the Commission's present position might be tenable, but this is far from the case. In the opinion by which the Commission disposed of Hansen's petition for reconsideration (A. 24 ff.), it made a brief reference to its action mooting the Hansen application, then, with the preface, "The questions that remains to be decided are...", it went forward to give comprehensive consideration to the questions of law and policy raised by the application and to reach firm, dispositive conclusions on those questions. A. 24, 26. The disposition thus made can scarcely be regarded as mere dictum. On the contrary, it is apparent from numerous prior actions of the Commission that but for its holding that the Hansen

mortgage rider is violative of its rule against reversions, the Commission would have refrained from cancelling the license and would have granted the assignment application. Stated otherwise, the Commission has shown by many decisions that where the circumstances require that a license be withdrawn from the hands of the licensee, and where there is pending an application to assign the license, it does not always act to declare the license forfeited and to dismiss the assignment application as moot. Rather, the Commission has made clear that, where the public interest would be served thereby, it will preserve a license which would otherwise be lost in order to make possible an assignment of the license pursuant to a pending assignment application. This is demonstrated in the following presentation.

The principle upon which the Commission rests here, i.e. that it may dismiss a pending assignment application if it has determined that the license has been forfeited, is supported by the decision of this Court in Jefferson Radio Company v. FCC, 119 U.S. App. D.C. 256, 340 F.2d 781 (1954). It must be observed, however, that the Jefferson case, and the several precedents on which the Court relied (340 F.2d at 783, n. 1), all involved the circumstance of a licensee who, facing the loss of his license as a direct result of his own misconduct, sought to make a profit, or to avoid a loss, by proposing a sale of the station. The reasoning in those cases is that

licensees would not be deterred from violations of the Communications Act, or of the Commission's rules and policies, if they knew that upon being called to account they could escape responsibility by selling their stations. Tidewater Teleradio, Inc., 24 RR 653, 657 (1962). No such circumstance exists in this case. The Hansen assignment application involves no payment or other benefit to Radio KDAN, Inc. — and this absence of consideration to the assignor has been regarded by the Commission as important enough to serve as a controlling factor in decisions in which the Commission preserved a license in order to entertain an assignment application. In Milton Broadcasting Co., 12 RR 2d 1077, 1080 (1968), the Commission said:

"In both the Martin Karig and Tinker, Inc. decisions¹/...the Commission emphasized that its policy 'has been and will continue to be to refuse to consider assignment applications where the character qualifications of the seller are in question.' Exceptions to that basic position were allowed in those two cases not only because of the licensee's poor health, but also because of the additional and crucial fact that the assignor would derive no profit from the proposed divestiture."

The same factor was given great weight in Twelve Seventy, Inc., 7 RR 2d 336, 341 (1966), where principals of the licensee were charged with undisclosed changes in ownership and an unlawful transfer of control, and in KGKB, Inc.,

¹/ The reference is to Martin Karig, 3 RR 2d 669 (1964) and Tinker, Inc., 9 RR 2d 1239 (1967).

6 RR 2d 513, 516-517 (1965), where principals of the licensee were charged with misrepresentations to the Commission as well as an unlawful transfer of control.

The licensee in this case, Radio KDAN, Inc., was not charged with any such character deficiencies or violations of law. Its license came into jeopardy solely because it suffered financial adversity. If it had been able to meet its financial obligations, it would not have been compelled to take the station off the air, it would not have fallen into default to Hansen, and the Commission would not have been called upon to consider the Hansen application for assignment of the license. Such situations are common, however. The Commission has often been presented with a proposal for an assignment of a license which the licensee was on the verge of losing because it was no longer financially qualified, and the Commission's approach to these situations is reflected in its decision in Northwest Broadcasters, Inc., 7 RR 2d 396 (1966), where it said:

"The renewal applicant in this case although qualified in all other respects is not financially qualified to operate the station. It has been silent and its licensee has no plans to return it to the air. For many years, the Commission has under such circumstances of financial disqualification nevertheless granted innumerable renewal applications for the purpose of permitting a qualified buyer to purchase the licensee's assets and

become the assignee of the license..."^{2/}
7 RR 2d at 399.

In Blue Island Community Broadcasting Co., Inc., 6 RR 2d 136, 138 (1965), the Commission granted an assignment application while there was still an outstanding unresolved hearing issue to determine whether the licensee was financially qualified. Also see Arthur A. Cirilli, 6 RR 2d 903, 905 (1966). In both the KGKB case and the Northwest case, supra, the Commission also attached great significance to the fact that it was dealing with a station which was silent, but would be restored to regular operation most promptly if the assignment application were granted. In the case at hand, Hansen has lawfully gained title to, and possession of, all the assets of the station, and a grant of his assignment application would lead to an early resumption of the operation.^{3/}

Hansen pleaded to the Commission for relief of the same sort as it has granted in the cases cited. He asked that the cancellation of the license be held in abeyance until his pending assignment application could be acted upon. A. 23. This is virtually identical to the action which the Commission considered to be dictated by "common sense and the public

^{2/} Denying an application for renewal of a license has the same effect as declaring the license to be forfeited.

^{3/} Hansen even requested, in the assignment application, that he be authorized to put the station back on the air on an interim basis pending final action on the application.

interest" in the KGKB case (6 RR 2d at 517), and it is consistent with the approach the Commission has taken in many comparable situations. Thus, the relief Hansen seeks of this court is not an order requiring the Commission to entertain an application for assignment of a license that doesn't exist, but for an order requiring the Commission to rescind its cancellation of the license and thereupon to give due consideration to the assignment application. This appeal brings before the Court all that it needs to support such an order.

Finally, Hansen has shown by his brief (Pp. 10-13) the realistic considerations which ought to guide the Commission in applying its rule against reversions to situations involving default and foreclosure. Now, if the Commission is to be permitted to use, in these situations, the device it has utilized here, then it does not need a rule to prohibit reversion of the license in the event of default. It may simply declare the license forfeit because the licensee has lost his site and equipment under the foreclosure, then bar the door to the creditor on the ground that there is no longer any license to assign. The Commission must not be permitted the use of a tool so arbitrary in nature, and so totally unsupported by public interest considerations.

II. NEITHER THE COMMUNICATIONS ACT
NOR THE COMMISSION'S POLICIES
REQUIRE, OR SUPPORT, THE ARBITRARY
AND INCONSISTENT ACTION TAKEN HERE

The Commission states in its brief that, "It has long been the Commission's position that a broadcasting license, as distinguished from a station's physical assets, may not be hypothecated by way of mortgage, lien, pledge, etc." Brief of Appellee, P. 10. This cannot be so, for, as Hansen has shown by his brief (P. 15 ff.), not only has the Commission occasionally approved contracts which expressly provided for mortgaging of the licenses involved, but it also appears to have acted consistently, and without exception, in approving contracts which provided for pledges of the capital stock of licensee corporations. For the purposes involved here, there is no significant difference between the hypothecation of a license and the hypothecation of the stock of the licensee corporation.

The Commission goes on to say that its policy against reversionary clauses is "dictated by the statutory mandate of Section 301 of the Communications Act and is not subject to administrative balancing as Hansen would have the Commission do." While it is quite clear that this statutory provision cautions the Commission to make certain that a licensee does not obtain, or purport to obtain, an ownership interest in a license, there is literally nothing in the statute which required the Commission to hold that the mortgage rider involved here compelled summary dismissal of the Hansen assignment application.

The Commission protests that its policy has been necessary in order to avoid anything which "endangers the independence of the licensee who is and should be at all times responsible for and

accountable to the Commission in the exercise of the broadcasting trust." It is not at all clear how a contract provision which enables the seller of a station to apply for consent to a reassignment of the license in the event of default by the buyer serves to endanger the independence of the buyer, but, in any event, the Commission may not be heard to argue that the mortgage rider involved here served to endanger the independence of the licensee when the Commission has, on so many occasions in the past, approved other agreements which served to give the seller much more direct control over the licensee and a much more certain right to a reversion of the license in the event of default. A. 53 ff. Moreover, the Commission cannot rationally hold that the mortgaging of a license endangers the independence of a licensee more than the mortgaging of the physical assets of the station, when the latter threatens the licensee that, on default, he can be stripped of his plant and left with a bare license which he cannot use and cannot sell.

III. HANSEN'S ASSERTION OF ERROR IN
THE DISMISSAL OF HIS APPLICATION
WITHOUT A HEARING IS NOT OVERCOME
BY THE COMMISSION'S ARGUMENT THAT
IT WOULD HAVE ACTED IN THE SAME
WAY NINE YEARS AGO

Responsive to Hansen's argument that he was entitled to a hearing before his assignment application could be dismissed, the Commission says, "the answer to this contention is simply that had Hansen submitted the mortgage rider to the Commission at the time of its execution as required by the rules, it would have been rejected for the very reasons he now claims were not apparent to him." Brief of Appellee, P. 14. This "answer" is no answer at all.

If Hansen's point is correct, i.e., that the rule and the published cases do not fairly advise a reasonable applicant that a mortgage rider of the sort involved here will be considered a patent violation of the rule and will result in summary dismissal of an application, then his point would have been as well taken nine years ago as it is now, and the Commission's denial of a hearing would have been as much a denial of due process then as it is now.

The Commission goes on to refer to the language of the rule and then asserts that "to claim that this language is unclear stretches credulity to an extreme." Hansen has stated quite plainly that he is not claiming that the language is unclear, but that the language does not serve to advise that the particular mortgage provision involved here would, as a matter of law, constitute a patent violation of the rule.

The Commission persists in making the observation that failure to file the mortgage with the Commission in 1959 was a violation of its rules, and it implies that it was Hansen who was guilty of the violation. Brief for Appellee, P. 9, n. 5, and P. 14, n. 7. The rule involved is not the one which requires that an assignment application contain all the agreements between the parties. The mortgage in this case was agreed upon, made, and executed, at the closing following the Commission's approval of the 1959 assignment application. Rather, the pertinent rule is the one which requires that there be filed with the Commission a copy of any mortgage which contains provisions,

"...restricting the licensee's...freedom of operation, such as those affecting voting rights, specifying or limiting the amount of dividends payable, the purchase of new equipment, the maintenance of current assets, etc. ..." Section 1.613(b)(5) of the Commission's Rules, 47 C.F.R. 1.613(b)(5).

Whether these provisions required the filing of a copy of the Hansen mortgage is plainly questionable, but, in any case, the responsibility for the filing is expressly imposed upon the licensee of the station, and not upon any other person who might be a party to such an instrument. It follows that Radio KDAN, Inc. was responsible for filing the mortgage with the Commission. It also follows that it is erroneous and prejudicial for the Commission to say or to imply that Hansen was guilty of violating the rule by failing to file the agreement.

IV. THE COMMISSION HAS PROVIDED NO LEGAL BASIS UPON WHICH THE COURT MAY IGNORE HANSEN'S SHOWING OF INCONSISTENCY IN COMMISSION ACTIONS AND HIS ASSERTION OF ERROR REGARDING THE AVAILABILITY OF THE FREQUENCY

With painstaking care and effort, Hansen accumulated and presented to the Court pertinent excerpts from 36 contracts out of a sample of some 155 examined.^{4/} The Commission would have the

^{4/} The Commission asserts (P. 15, n.8) that the inclusion of these extracts to the Appendix,

"...violates Rule 33(b) of the Federal Rules of Appellate Procedure in that they are not part of the record on appeal. Also, the Commission never agreed to the inclusion of this material in the appendix."

The rule reference is, of course, a mistake. The rule governing the record on review is Rule 16, and there is nothing in the rule which bars Hansen from presenting to the Court information as to other Commission actions which are inconsistent with the action taken here. The Commission is also mistaken in its second point. The undersigned counsel for Hansen expressly informed the Commission counsel first assigned to the case that he wished to include the extracts in the appendix, and counsel made it clear that he had no objection.

Court decline to consider this showing on the ground that Hansen did not first present to the Commission the showing and the argument about the inconsistency of its actions. The whole answer to this point is something that the Commission appears to have overlooked, i.e., that the Commission's claim that its action on the Hansen assignment application is consistent with the actions it has taken in the past is a point on which the Commission relied to support its last and final order in this matter, the order by which it denied Hansen's petition for reconsideration. A. 24, 28. Hansen was not obliged to file a second petition for reconsideration in order to challenge that point.

The Commission further complains that the extracts are,

"...unclear as to their full meaning due to the absence of either the full contract section in question or other apparently relevant parts which are not presented in the appendix...Thus...consideration of the material tendered by Hansen would not be fruitful because of the fact that it is presented in part only and totally out of context."

This assertion is without substance. The extracts were made carefully, for the purpose of showing the Court the pertinent security provisions, and with an effort to assure that nothing presented would constitute a distortion of the intent of the parties. If the Commission finds fault with the extracts, it must do something more than simply to state its conclusion that they are faulty, but is obliged to show, at least by a few examples, that the appellant has produced distortions. Moreover, the contracts are in the Commission's possession. It can readily ascertain that the extracts are fairly presented.

Finally, the Commission would also have the Court ignore its error concerning the availability of the frequency on the ground that this point was not raised before the Commission. This matter arises because the Commission stated that in declaring the license for KDAN to be forfeited it was making the frequency available for use by others in Eureka or elsewhere. It is now blatantly clear that the Commission came to that statement without first ascertaining whether or not the frequency would actually be available under its new rules. This is neglectful, at best, for the Commission has all the staff, all the means, and all the special expertise it needed to make the determination. Its duty to do so is magnified by the fact that the consequence of refusing to entertain the Hansen assignment application is that the Eureka community is forever barred from enjoying the services of KDAN or any other station which might replace it. Before indulging in its summary action dismissing the Hansen application, the Commission had a duty to weigh this consequence, and to determine the facts bearing upon it, without waiting for Hansen or anybody else to raise the question.

Also, after this appeal was filed, but before Hansen filed his brief, Hansen's counsel informed the Commission's counsel of the finding of Hansen's consulting engineer that the frequency is not available, and suggested that counsel have the Commission's staff make the determination itself so that it would be possible to come before the Court with the facts. It appears that the



Commission did not bestir itself to make the determination. Now, in its brief (P. 17), the Commission points out that there are two pending applications for the use of the frequency at Eureka, and thus implies that Hansen's consulting engineer must be wrong and the frequency must still be available. The fact is that these applications have not yet been reached for processing, and have thus not yet been exposed to the Commission engineers who will make the determination that the frequency is not available.

CONCLUSION

The Commission has not presented any argument which persuasively supports the extraordinarily arbitrary and unreasonable action it took in this matter. The relief requested by Hansen ought to be granted.

Respectfully submitted,

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